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APPENDIX B

1. The History of the Federal Constitution with Regard to Representation in Congress

a. The Convention.—The Confederation of the United States, which was formed in 1777 by the thirteen States, was explicitly a confederation of sovereign States. Articles of Confederation, Article II. Each State, although it could have two to seven delegates to the Congress, had a single vote. *Id.*, Art. V. While the power to make treaties and wage war was given to the Congress, most powers were reserved to the States. *Id.* Art. II, VI. For example, the Congress could not impose taxes, but could only ask the States to contribute particular sums. *Id.*, Art. VIII.

The lack of power of the Confederation to meet the growing problems of the former colonies led to a serious crisis. See *The Federalist*, Nos. 15–22 (Cooke ed., 1961), pp. 90–146. The convention in Philadelphia was called by the Congress by a resolution dated February 21, 1787, "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union." III *Records of the Federal Convention* (Farrand ed., 1911),[1] 14. On May 18, 1787, a few days after the first delegates arrived in Philadelphia, Benjamin Franklin described the meeting as "a Convention of the prin-

[1] Hereinafter referred to as "Farrand."

cipal people in the several States, for the purpose of revising the federal Constitution, and proposing such amendments as shall be thoroughly necessary." Letter to Richard Price, May 18, 1787, *id.* at 21. Thus, both the Congress and Franklin conceived of the purpose of the convention as merely to revise the Confederation, but to keep its essential form.

On the other hand, some of the delegates arriving in Philadelphia were proposing to form an entirely different kind of government, a national government[2] in which representation in the legislature would be on the basis of population. George Mason, a delegate from Virginia, wrote his son on May 20, 1787 (III Farrand 23):

> The most prevalent idea in the principal States seems to be a total alternation of the present federal system, and substituting a great national council or parliament, consisting of two branches of the legislature, founded upon the principles of equal proportionate representation, with full legislative powers upon all the subjects of the Union; and an executive: and to make the several State legislatures subordinate to the national, by giving the latter the power of a negative upon all such laws as they shall judge contrary to the interest of the federal Union.

A few days later, on May 21, Mason wrote almost identical words to Arthur Lee. *Id.* at 24. That same day, George Read, a delegate from Delaware, wrote

[2] The terms national and federal government were used by the framers themselves in conflicting ways apparently for partisan advantage. Therefore, the meaning can be ascertained only from the particular context. We, however, use national government to mean a government operating directly on the people in which the States are plainly subordinate. We use Federal government to mean a government which can regulate certain areas but with the other areas remaining under the authority of sovereign States.

to John Dickinson, another delegate from Delaware, of a proposal for a new federal system (*id.* at 25):

> Some of its principal features are taken from the New York system of government. A house of delegates and senate for a general legislature, as to the great business of the Union. The first of them to be chosen by the Legislature of each State, in proportion to its number of white inhabitants, and three-fifths of all others, fixing a number for sending each representative. The second, to wit, the senate, to be elected by the delegates so returned, either from themselves or the people at large, in four great districts, into which the United States are to be divided for the purpose of forming this senate from, which, when so formed, is to be divided into four classes for the purpose of an annual rotation of a fourth of the members.[3]

Read warned that the small States must be careful to protect their interests. *Ibid.* George Mason wrote his son on June 1 that (*id.* at 32):

> The idea I formerly mentioned to you, before the Convention met, of a great national council, consisting of two branches of the legislature, a judiciary and an executive; upon the principle of fair representation in the legislature, with powers adapted to the great objects of the Union, and consequently a control in these instances, on the State legislatures, is still the prevalent one. Virginia has had the honor of presenting the outlines of the plan. * * *.

The convention held its first meeting on May 14, 1787, but was adjoined because of lack of a quorum. I Farrand 1. Soon after regular sessions started on May 25th, the convention started to do its work

[3] The New York Senate and Assembly were apportioned by eligible voters. New York Constitution of 1777, Articles 4, 12.

through a Committee of the Whole. On May 31, in debate on whether the first branch of the legislature should be elected directly by the people, George Mason (I Farrand 48–49):

> * * * argued strongly for an election of the larger branch by the people. It was to be the grand depository of the democratic principle of the Govt.

During debate on June 6th on whether the upper house of the new legislature should be elected by the state legislatures instead of the people, Pierce Butler of South Carolina stated that he opposed "determining the mode of election until the ratio of Representation is fixed—if that proceeds on a principle favorable to wealth as well as number of Free Inhabitants, I am content to unite wh. Delaware (Mr. Read) in abolishing the State Legislatures, and becoming one Nation instead of a confedn. of Republics—" [King].[4] I Farrand 144. The next day, in continuing the debate on the same proposals, Madison said that if the Senate was to be elected by the state legislatures (*id.* at 151):

> * * * we must either depart from the doctrine of proportional representation; or admit into the Senate a very large number of members. The first is inadmissible, being evidently unjust. The second is inexpedient.

George Mason stated (*id.* at 161):[5]

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[4] All references to the proceedings of the constitutional convention are to the official Journal or to Madison's notes unless otherwise indicated. Rufus King of Massachusetts and Robert Yates of New York also made notes of part of the proceedings to which we will occasionally refer.

[5] This quotation is from Mason's notes of a speech which Farrand believes was given on June 7. I Farrand 160–161, note 8.

> The treaties, leagues, and confederacies between different sovereign, independent powers have been urged as proofs in support of the propriety and justice of the single and equal representation of each individual State in the American Union; and thence conclusions have been drawn that the people of these United States would refuse to adopt a government founded more on an equal representation of the people themselves, than on the distinct representation of each separate, individual State. If the different States in our Union always had been as now substantially and in reality distinct, sovereign and independent, this kind of reasoning would have great force * * *.

On June 8th, Gunning Bedford of Delaware complained of attempts (I Farrand 167):

> * * * to strip the small States of their equal right of suffrage. In this case Delaware would have about 1/90 for its share in the General Councils, whilst Pa. & Va. would possess 1/3 of the whole. * * * This shows the impossibility of adopting such a system as that on the table, or any other founded on a change in the principle of representation.

The next day, June 9th, the Committee of the Whole considered the resolution (I Farrand 181):

> *Resolved, therefore, that the rights of suffrage in the national legislature ought to be apportioned to the quotas of contribution, or to the number of inhabitants, as the one or other rule may seem best in different cases.* [Yates]

A long debate ensued. William Paterson of New Jersey said that (*id.* at 177):

> * * * the proposition for a proportional representation [struck] at the existence of the lesser States. He wd. premise however to an investigation of this question some remarks on

> the nature structure and powers of the Convention. The Convention he said was formed in pursuance of an Act of Congs. that this act was recited in several of the Commissions, particularly that of Massts. which he required to be read: That the amendment of the confederacy was the object of all the laws and commissions on the subject; that the articles of the confederation were therefore the proper basis of all the proceedings of the Convention. We ought to keep within its limits, or we should be charged by our constituents with usurpation.

Paterson then stated (*id.* at 178):

> A confederacy supposes sovereignty in the members composing it & sovereignty supposes equality. If we are to be considered as a nation, all State distinctions must be abolished, the whole must be thrown into hotchpot, and when an equal division is made, then there may be fairly an equality of representation.

Paterson's notes for his speech on June 9th state (*id.* at 186):

> Each State is sovereign, free, and independent, etc. Sovereignty includes Equality—
>
> If then the States in Union are as States still to continue in Union, they must be considered as Equals—
>
> 13 sovereign and independent States can never constitute one Nation, and at the same Time be States—they may by Treaty make one confederated Body—

James Wilson of Pennsylvania, a proponent of a strong national government (I Farrand 179–180):

> * * * entered elaborately into the defence of a proportional representation, stating for his first position that as all authority was derived from the people, equal numbers of people ought to have an equal no. of representatives, and dif-

> ferent numbers of people different numbers of representatives. This principle had been improperly violated in the Confederation, owing to the urgent circumstances of the time. * * * Mr. P. admitted persons, not property to be the measure of suffrage. Are not the citizens of Pena. equal to those of N. Jersey? does it require 150 of the former to balance 50 of the latter? Representatives of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other.

The next speaker, Hugh Williamson of North Carolina (*id.* at 180):

> * * * illustrated the cases by a comparison of the different States, to Counties of different sizes within the same States; observing that proportional representation was admitted to be just in the latter case, and could not therefore be fairly contested in the former.

Judge David Brearly of New Jersey agreed with Paterson (*id.* at 181–182):

> If the states still remain sovereign, the form of the present resolve is founded on principles of injustice. He then stated the comparative weight of each state—the number of votes 90. Georgia would be 1, Virginia 16, and so of the rest. This vote must defeat itself, or end in despotism. If we must have a national government, what is the remedy? Lay the map of the confederation on the table, and extinguish the present boundary lines of the respective state jurisdictions, and make a new division so that each state is equal—then a government on the present system will be just. [Yates]

In contrast, Edward Carrington wrote Thomas Jefferson on the same day that the basic issues before the convention (III Farrand 38–39):

> * * * are reducible to two schemes—the first, a consolidation of the whole Empire into one republic, leaving in the states nothing more than subordinate courts for facilitating the administration of the Laws—the second an investiture of of [sic] a foederal sovereignty with full and independant authority as to the Trade, Revenues, and forces of the Union, and the rights of peace and War, together with a Negative upon all the Acts of the State legislatures. the first idea, I apprehend, would be impracticable, and therefore do not suppose it can be adopted—general Laws through a Country embracing so many climates, productions, and manners, as the United States, would operate many oppressions, & a general legislature would be found incompetent to the formation of local ones, as a majority would, in every instance, be ignorant of, and unaffected by the objects of legislation * * *. Something like the second will probably be formed—indeed I am certain that nothing less than what will give the foederal sovereignty a compleat controul over the State Governments, will be thought worthy of discussion * * *.

On June 11, 1787, a resolution was introduced (I Farrand 192–193):

> that the right of suffrage in the first branch of the national Legislature ought not to be according to the rule established in the articles of confederation; but according to some equitable ratio of representation * * * in proportion to the whole number of white and other free Citizens and inhabitants of every age; sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes in each State.

The resolution was passed 8 to 2 by the Committee of the Whole with only New Jersey and Delaware opposing. Roger Sherman of Connecticut then proposed

for the first time the plan which was ultimately adopted for the Congress: "[t]hat in the second branch of the National Legislature each State have One vote." *Id.* at 193. Sherman explained (*id.* at 204):

> * * * that as the people ought to have the election of one of the branches of the legislature, the legislature of each state ought to have the election of the second branch, in order to preserve the state sovereignty; and that each state ought in this branch to have one vote. [Yates]

The resolution was rejected 6 states to 5. *Id.* at 193. James Wilson then proposed a resolution, which was seconded by Alexander Hamilton: "that the right of suffrage in the second branch of the national Legislature ought to be according to the rule established in the first." *Ibid.* This resolution was passed 6 to 5.

The debate on June 11th centered in large part on whether the legislature should be apportioned according to inhabitants or taxes.[6] John Rutledge of South Carolina (I Farrand 196):

> * * * proposed that the proportion of suffrage in the 1st branch should be according to the quotas of contribution. The justice of this rule he said could not be contested.

Pierce Butler of South Carolina supported Rutledge's proposal (*id.* at 204):

> [M]oney is strength; and every state ought to have its weight in the national council in

[6] New Hampshire still apportions its Senate by taxes paid. The support for this proposition at the convention reflects the belief that apportionment by taxes as well as by population was equitable, since the former constituted the contribution of the States to the federal government. On the other hand, equal representation to all the States, regardless of inhabitants or contribution, was considered by the supporters of apportionment according to taxes to be unfair.

> proportion to the quantity it possesses. [Yates]

John Dickenson likewise (*id.* at 196):

> * * * contended for the *actual* contributions of the States as the rule of their representation & suffrage in the first branch.

Elbridge Gerry of Massachusetts opposed the proposal because he (*id.* at 201):

> * * * thought property not the rule of representation. Why then shd. the blacks, who were property in the South, be in the rule of representation more than the cattle & horses of the North.

Benjamin Franklin said that he thought that (*id.* at 197–198):

> * * * the number of Representatives should bear some proportion to the number of the Represented; and that the decisions shd. be by the majority of members, not by the majority of States. This is objected to from an apprehension that the greater States would then swallow up the smaller * * *.
>
> But, Sir, in the present mode of voting by States, it is equally in the power of the lesser States to swallow up the greater * * *.

On June 14, the North Carolina delegates wrote to Governor Caswell that the problem of the convention was to form a "Union of Sovereign States; preserving their Civil Liberties and connected together by such Tyes as to Preserve permanent & effective Governments * * *. III Farrand 46.

The New Jersey plan was presented to the convention by Paterson on June 15. Its first sentence emphasized: "That a union of the States merely federal ought to be the sole Object of the Exercise of the Powers vested in this Convention." III Far-

rand 611. As to Congress, the plan provided (*id.* at 613):

> Resolved That every State in the Union as a State possesses an equal Right to, and Share of, Sovereignty, Freedom, and Independance—
> Resolved, therefore, that the Representation in the supreme Legislature ought to be by States, otherwise some of the States in the Union will possess a greater Share of Sovereignty, Freedom, and Independence than others * * *

The next day, Paterson explained the basic assumptions of the plan (I Farrand 250):

> * * * If the confederacy was radically wrong, let us return to our States, and obtain larger powers, not assume them of ourselves. * * * Our object is not such a Governmt. as may be best in itself, but such a one as our Constituents have authorized us to prepare, and as they will approve. If we argue the matter on the supposition that no Confederacy at present exists, it can not be denied that all the States stand on the footing of equal sovereignty. * * * If we argue on the fact that a federal compact actually exists, and consult the articles of it we still find an equal Sovereignty to be the basis of it. He reads the 5th. art: of Confederation giving each State a vote—& the 13th. declaring that no alteration shall be made without unanimous consent. This is the nature of all treaties.

Turning to the question of representation, he said (*id.* at 251):

> If the sovereignty of the States is to be maintained, the Representatives must be drawn immediately from the States, not from the people: and we have no power to vary the idea of equal sovereignty.

James Wilson replied strongly (*id.* at 253–254):

> He would not repeat the remarks he had formerly made as the principles of Representation. he would only [say] that an inequality in it, has ever been a poison contaminating every branch of Govt. In G. Britain where this poison has had a full operation, the security of private rights is owing entirely to the purity of her tribunals of Justice * * *. The political liberty of that Nation, owing to the inequality of representation is at the mercy of its rulers.

Paterson then responded (*id.* at 259):

> [R]epresentation must be drawn from the states to maintain their independency, and not from the people composing those states.
>
> The doctrine advanced by a learned gentleman from Pennsylvania [Wilson], that all power is derived from the people, and that in proportion to their numbers they ought to participate equally in the benefits and rights of government, is right in principle, but unfortunately for him, wrong in the application to the question now in debate.
>
> When independent societies confederate for mutual defence, they do so in their collective capacity; and then each state for those purposes must be considered as *one* of the contracting parties. Destroy this balance of equality, and you endanger the rights of the *lesser* societies by the danger of usurpation in the greater.
>
> Let us test the government intended to be made by the Virginia plan on these principles. The representatives in the national legislature are to be in proportion to the number of inhabitants in each state. So far it is right upon the principles of equality, when state distinctions are done away; but those to certain purposes still exist * * *.

In his notes, Rufus King shows how speakers favoring representation by population based their argu-

ment on the kind of government which was to be constituted. His notes state as to Robert Lansing of New York, who favored giving equal representation to all the States (I Farrand 263-264):

Lansing

Natl.	Fedl.
One Br. to come from the people in propn. to yr. numbers	To come from the State Legislatures equally & to represent the States
All acts of ind. States subject to a national Negative	To possess enumerated powers
Will absorb the State sovereignties & leave them mere Corporations, & Electors of the natl. Senate—	

Remarks—The confedn. admits the sovereignties of the States—it speaks of an Union—but it never meant a consolidation—If this had been in view NYk never wd. have sent Delegates * * *

Similarly, King's notes show as to Wilson, who proposed apportionment by population (*id.* at 265-266):

Wilson—contrasts the two—

Nat.	Fed.
Legis. of 2 Brs.	A Congress or one Br.
The People are the basis of Rep—	The Legislatures of the State
A repn. according to Numbers or Wealth	The States are equal

1st Where the principle of unequal Represtn. prevails there exists a poison wh. eventually will destroy it the Government—

On June 18, 1787, Alexander Hamilton attacked the New Jersey plan (I Farrand 286):

> Another destructive ingredient in the [New Jersey] plan, is that equality of suffrage which is so much desired by the small States. It is not in human nature that Va. & the large States should consent to it, or if they did that they shd. long abide by it. It shocks too much the ideas of Justice, and every human feeling * * *.

He also submitted to the Committee of the Whole a sketch of a plan for the new government.[7] The plan set the number of Representatives at the start for each State apparently on the basis of population. After that, the plan provided (III *id.* at 620):

> The Legislature shall provide for the future elections of Representatives, apportioning them in each State, from time to time as nearly as may be to the number of persons described in the 4 § of the VII article,[8] so as that the whole number of Representatives shall never be less than one hundred, nor more than hundred. There shall be a Census taken for this purpose within three years after the first meeting of the Legislature, and within every successive period of ten years.

The composition of the initial Senate was likewise to be prescribed by the constitution but the number for each State had not been filled in. As to the appor-

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[7] This plan was never actually before the convention. III Farrand 617.

[8] Article VII, Section 4 of the plan provided for the apportionment of direct taxes among the States by the number of inhabitants, except Indians not taxed and three-fifths of all other persons. III Farrand 628.

tionment of senators, Hamilton's plan provided (*id.* at 621):

> The Legislature shall provide for the future elections of Senators, for which purpose the States respectively, which have more than one Senator, shall be divided into convenient districts to which the Senators shall be apportioned. A State having but one Senator shall be itself a district. * * *
>
> The number of Senators shall never be less than forty, nor shall any State, if the same shall not hereafter be divided, ever have less than the number allotted to it in the second section of this article; but the Legislature may increase the whole number of Senators, in the same proportion to the whole number of Representatives as forty is to one hundred; and such increase beyond the present number, shall be apportioned to the respective States in a ratio to the respective numbers of their representatives.
>
> If States shall be divided, or if a new arrangement of the boundaries of two or more States shall take place, the Legislature shall apportion the number of Senators (in elections succeeding such division or new arrangement) to which the constituent parts were entitled according to the change of situation, having regard to the number of persons described in the 4. § of the VII article.

Thus, the apportionment of the new Senate was also to be based on population, although no State could have its representation reduced from that prescribed for the first Senate.

James Madison returned to the proposal of Judge Brearly that the boundaries of the States should be redrawn to provide equal population and they should be given equal representation in the legislature (I Farrand 321):

> It was admitted by both the gentlemen from N. Jersey, (Mr. Brearly and Mr. Pater-

> son) that it would not be *just to allow Virga.* which was 16 times as large as Delaware an equal vote only. Their language was that it would not be *safe for Delaware* to allow Virga. 16 times as many votes. The expedient proposed by them was that all the States should be thrown into one mass and a new partition be made into 13 equal parts.

Madison, however, decided that the plan was impracticable (*id.*, at 322):

> The prospect of many new States to the Westward was another consideration of importance. If they should come into the Union at all, they would come when they contained but but [sic] few inhabitants. If they shd. be entitled to vote according to their proportions of inhabitants, all would be right & safe. Let them have an equal vote, and a more objectionable minority than ever might give law to the whole.

Alexander Martin of North Carolina said (*id.* at 324):

> [The States] entered into the confederation on the footing of equality; that they met now to to [sic] amend it on the same footing, and that he could never accede to a plan that would introduce an inequality and lay 10 States at the mercy of Va. Massts. and Penna.

On June 20, the convention itself began to consider the proposals which had been made in committee. Robert Lansing of New York responded to Wilson's citation (see p. 12 above) of the corruption resulting from rotten boroughs in England (I Farrand 337):

> The point of Representation could receive no elucidation from the case of England. The corruption of the boroughs did not proceed from their comparative smallness: but from the actual fewness of the inhabitants, some of them not having more than one or two. a great in-

> equality existed in the Counties of England. Yet the like complaint of peculiar corruption in the small ones had not been made.

Roger Sherman again repeated his proposal to have two branches of the legislature apportioned differently (*id.* at 342–343):

> The disparity of the States in point of size he perceived was the main difficulty. But the large States had not yet suffered from the equality of votes enjoyed by the small ones. In all great and general points, the interests of all the States were the same. * * * If the difficulty on the subject of representation can not be otherwise got over, he would agree to have two branches, and a proportional representation in one of them, provided each State had an equal voice in the other. This was necessary to secure the rights of the lesser States; otherwise three or four of the large States would rule the others as they please.

The next day, William Samuel Johnson of Connecticut noted that James Wilson and the Virginians had said that they did not want to abolish the States (I Farrand 355):

> He wished it therefore to be well considered whether in case the States, as was proposed, shd. retain some portion of sovereignty at least, this portion could be preserved, without allowing them to participate effectually in the Genl. Govt., without giving them each a distinct and equal vote for the purpose of defending themselves in the general Councils.

The debate as to representation continued on June 25, 1787. Nathaniel Gorham of Massachusetts said that (I Farrand 404–405):

> * * * he inclined to a compromise as to the rule of proportion. He thought there was some

> weight in the objections of the small States. If Va. should have 16 votes & Delre. with several other States together 16. those from Virga. would be more likely to unite than the others, and would therefore have an undue influence. This remark was applicable not only to States, but to Counties or other districts of the same State. Accordingly the Constitution of Massts. had provided that the representatives of the larger districts should not be in an exact ratio to their numbers.* And experience he thought had shewn the provision to be expedient.

George Read of Delaware complained that the large States had appropriated the western lands which should have been applied to the public debt (*id.* at 405):

> Let justice be done on this head; let the fund be applied fairly & equally to the discharge of the general debt, and the smaller States who had been injured would listen then perhaps to those ideas of just representation which had been held out.

James Wilson opposed election of the second branch by the state legislatures (*id.* at 406):

> The Genl. Govt. is not an assemblage of States, but of individuals for certain political purposes—it is not meant for the States, but for the individuals composing them: the *individuals* therefore not the *States*, ought to be represented in it: A proportion in this representation can be preserved in the 2d. as well as in the 1st. branch; and the election can be made by electors chosen by the people for that purpose,

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* The Massachusetts Constitution of 1780 provided that the Senate would be apportioned among the districts on the basis of taxes paid. Part II, Ch. I, Sec. 2, Art. I. One member of the House of Representatives was apportioned to each town having 150 voters and an additional member for every 225 additional voters, except that each existing town was given at least one. Part II, Ch. I, Sec. 3, Art. II.

However, his amendment to this effect was not seconded.

Pierce Butler of South Carolina proposed postponing the issue as to the election of second branch until the question of representation was decided. James Madison seconded the proposal, but it was rejected 7 to 4. I Farrand 407–408. The convention then voted 9 to 2 to have the second house elected by the state legislatures, with Virginia and Pennsylvania opposing. At this point in his notes Madison dropped a footnote (*id.* at 408):

> It must be kept in view that the largest States particularly Pennsylvania & Virginia always considered the choice of the 2d. Branch by the State Legislatures as opposed to a proportional Representation to which they were attached as a fundamental principle of just Government. The smaller States who had opposite views, were reenforced by the members from the large States most anxious to secure the importance of the State Governments.

James Wilson of Pennsylvania likewise said at the convention (*id.* at 413):

> Equality of representation can not be established, if the second branch is elected by the state legislatures. [Yates]

In the debate on June 27th as to whether representation in the first house should be by population, Luther Martin of Maryland supported continuation of the state governments as under the Confederation. He said (I Farrand 437–438):

> [A]n equal vote in each State, was essential to the federal idea, and was founded in justice & freedom, not merely in policy: that tho' the States may give up this right of sovereignty, yet they had not, and ought not: that the States like individuals were in a State of nature

> equally sovereign & free * * *. [T]he States being equal cannot treat or confederate so as to give up an equality of votes without giving up their liberty: that the propositions on the table were a system of slavery for 10 States: that as Va. Masts. & Pa. have 42/90 of the votes they can do as they please without a miraculous Union of the other ten: that they will have nothing to do, but to gain over one of the ten to make them compleat masters of the rest * * *: that no State in ratifying the Confederation had objected to the equality of votes; that the complaints at present run not agst. this equality but the want of power; that 16 members from Va. would be more likely to act in concert than a like number formed of members from different States; that instead of a junction of the small States as a remedy, he thought a division of the large States would be more eligible.

Yates' account of this same speech states (*id.* at 440–441):

> This principle of equality, when applied to individuals, is lost in some degree, when he becomes a member of a society, to which it is transferred; and this society, by the name of state or kingdom is, with respect to others, again on a perfect footing of equality—a right to govern themselves as they please. Nor can any other state, of right, deprive them of this equality. If such a state confederates, it is intended for the good of the whole; and if it again confederate, those rights must be well guarded * * *. We must treat as free states with each other, upon the same terms of equality that men originally formed themselves into societies.
>
> * * * * *
>
> If the foundation of the existing confederation is well laid, powers may be added—You may safely add a third story to a house where the

> foundation is good * * *. Price says, that laws made by one man or a set of men, and not by common consent, is slavery—And it is so when applied to states, if you give them an unequal representation.

The next day, Luther Martin continued his speech (I Farrand 444-445):

> [T]he Genl. Govt. ought to be formed for the States, not for individuals: that if the States were to have votes in proportion to their numbers of people, it would be the same thing whether their (representatives) were chosen by the Legislatures or the people; the smaller States would be equally enslaved * * *.

Yates reports as to this speech (*id.* at 453–455):

> In a Federal government, a majority of states must and ought to tax. In the local government of states, counties may be unequal—still numbers, not property, govern. What is the government now forming over states or persons? As to the latter, their rights cannot be the object of a general government—These are already secured by their guardians, the state governments. The general government is therefore intended only to protect and guard the rights of the states as states. * * * Representation on federal principles can only flow from state societies * * *.
>
> * * * Your general government cannot be just or equal upon the Virginia plan, unless you abolish state interests. If this cannot be done, you must go back to principles purely federal.
>
> * * * * * *
>
> The admission of the larger states into the confederation, on the principles of equality, is dangerous—But on the Virginia system, it is ruinous and destructive. Still it is the true interest of all the states to confederate * * *.
>
> * * * * * *

> I would rather confederate with any single state, than submit to the Virginia plan. But we are already confederated, and no power on earth can dissolve it but by the consent of *all* the contracting powers—and four states, on this floor, have already declared their opposition to annihilate it * * *.

James Madison, in opposing the motion of Lansing that "the representation of the first branch be according to the articles of the confederation" [Yates] (I Farrand 455), said that (id. at 446–449):

> [H]e was much disposed to concur in any expedient not inconsistent with fundamental principles, that could remove the difficulty concerning the rule or representation. But he could neither be convinced that the rule contended for was just, nor necessary for the safety of the small States agst. the large States. That it was not just, had been conceded by Mr. Breerly [sic] & Mr. Patterson [sic] themselves. The expedient proposed by them was a new partition of the territory of the U. States. The fallacy of the reasoning drawn from the equality of Sovereign States in the formation of compacts, lay in confounding mere Treaties, in which were specified certain duties to which the parties were to be bound, and certain rules by which their subjects were to be reciprocally governed in their intercourse, with a compact by which an authority was created paramount to the parties & making laws for the government of them. If France, England & Spain were to enter into a Treaty for the regulation of commerce &c. with the Prince of Monacho & 4 or 5 other of the smallest sovereigns of Europe, they would not hesitate to treat as equals, and to make the regulations perfectly reciprocal. Wd. the case be the same if a Council were to be formed of deputies from each with authority and discretion, to

raise money, levy troops, determine the value of coin &c? Would 30 or 40 million of people submit their fortunes into the hands, of a few thousands? If they did it would only prove that they expected more from the terror of their superior force, than they feared from the selfishness of their feeble associates. Why are Counties of the same States represented in proportion to their numbers? Is it because the representatives are chosen by the people themselves? so will be the representatives in the Nationl. Legislature. Is it because, the larger have more at stake than the smaller? The case will be the same with the larger & smaller States. Is it because the laws are to operate immediately on their persons & properties? The same is the case in some degree as the articles of confederation stand; the same will be the case in a far greater degree under the plan proposed to be substituted. * * * By the plan proposed a compleat power of taxation, the highest prerogative of supremacy is proposed to be vested in the National Govt. Many other powers are added which assimilate it to the Govt. of individual States. The negative on the State laws proposed, will make it an essential branch of the State Legislatures & of course will require that it should be exercized by a body established on like principles with the other branches of those Legislatures. * * *

* * * * *

* * * In a word; the two extremes before us are a perfect separation & a perfect incorporation, of the 13 States. In the first case they would be independent nations subject to no law, but the law of nations. In the last, they would be mere counties of one entire republic, subject to one common law. In the first case the smaller states would have every thing to fear from the larger. In the last they would have

> nothing to fear. The true policy of the small States therefore lies in promoting those principles & that form of Govt. which will most approximate the States to the condition of Counties.

Yates reports that Madison said (*id.* at 457):

> There is danger in the idea of the gentleman from Connecticut. Unjust representation will ever produce it. In the United Netherlands, Holland governs the whole, although she has only one vote. The counties in Virginia are exceedingly disproportionate, and yet the smaller has an equal vote with the greater, and no inconvenience arises.[10]

Returning to the analogy of England's rotten boroughs, James Wilson said (I Farrand 449–450):

> The leading argument of those who contend for equality of votes among the States is that the States as such being equal, and being represented not as districts of individuals, but in their political & corporate capacities, are entitled to an equality of suffrage. According to this mode of reasoning the representation of the burroughs in Engld which has been allowed on all hands to be the rotten part of the Constitution, is perfectly right & proper. They are like the States represented in their corporate capacity like the States therefore they are entitled to equal voices, old Sarum [a rotten borough] to as many as London. And instead of the injury supposed hitherto to be done to London, the true ground of complaint lies with old

[10] The last sentence, supporting representation on a non-population basis, seems almost surely an error of the reporter. It is inconsistent with the first two sentences of the same account, as well as with numerous other statements made by Madison at the convention. Furthermore, it is not reflected in Madison's own detailed and presumably more accurate account of his speech which is quoted in the text above.

> Sarum; for London instead of two which is her proper share, sends four representatives to Parliament.

Yates says that Wilson stated (*id.* at 457):

> I should be glad to hear the gentleman from Maryland explain himself upon the remark of Old Sarum, when compared with the city of London. This he has allowed to be an unjust proportion; as in the one place one man sends two members, and in the other one million are represented by four members. I would be glad to hear how he applies this to the larger and smaller states in America; and whether the borough, as a borough, is represented, or the people of the borough.

Luther Martin answered that Britain's rotten boroughs were not analogous since (*ibid.*):

> Individuals, as composing a part of the whole of one consolidated government, are there represented. [Yates]

Roger Sherman argued for concessions by the larger State to protect the smaller. *Id.* at 450. He further stated (*id.* at 457):

> In society, the poor are equal to the rich in voting, although one pays more than the other. This arises from an equal distribution of liberty amongst all ranks; and it is, on the same grounds, secured to the states in the confederation * * *. [Yates]

Hugh Williamson of North Carolina supported representation based on population on the ground (*id.* at 456):

> If any argument will admit of demonsfration, it is that which declares, that all men have an equal right in society. Against this position, I have heard, as yet, no argument, and I could wish to hear what could be said against it * * *. [Yates]

On June 29th, William Samuel Johnson of Connecticut supported Roger Sherman's proposal that one house be apportioned on population and the other be apportioned equally among the States. In doing so, he explicitly based this proposal on a compromise as to the nature of the new government (I Farrand 461–462):

> The controversy must be endless whilst Gentlemen differ in the grounds of their arguments; Those on one side considering the States as districts of people composing one political Society; those on the other considering them as so many political societies. The fact is that the States do exist as political Societies, and a Govt. is to be formed for them in their political capacity, as well as for the individuals composing them. * * * On the whole he thought that as in some respects the States are to be considered in their political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined; that in *one* branch the *people*, ought to be represented; in the *other*, the *States*.

Rufus King's account of this speech is (*id.* at 476–477):

> Those who contend for an equality of Votes among the States, define a State to be a mere association of men & then say these Associations are equal—on the other hand those who contend for a Representation in proportion to numbers, Define a State to be a District of Country with a certain Number of Inhabitants, like a parish or County, and then say, these districts shd. have an influence in proportion to their Number of Inhabitants—both reason justly from yr. premises—we must then compromise—let both parties be gratified—let one House or Branch be formed by one Rule & & [sic] the other by another.

Madison continued to oppose the compromise because it over-emphasized the sovereignty of the States under the new Constitution and because equal representation by States was unjust (I Farrand 463–464):

> [T]he mixed nature of the Govt. ought to be kept in view; but thought too much stress was laid on the rank of the States as political societies. There was a gradation, he observed from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty. He pointed out the limitations on the sovereignty of the States. as now confederated * * *. Under the proposed Govt. the powers of the States will be much farther reduced. According to the views of every member, the Genl. Govt. will have powers far beyond those exercised by the British Parliament when the States were part of the British Empire. It will in particular have the power, without the consent of the State Legislatures, to levy money directly on the people themselves; and therefore not to divest such *unequal* portions of the people as composed the several States, of an *equal* voice, would subject the system to the reproaches & evils which have resulted from the vicious representation in G.B.
>
> He entreated the gentlemen representing the small States to renounce a principle wch. was confessedly unjust, which cd. never be admitted, & if admitted must infuse mortality into a Constitution which we wished to last forever.

Yates reports concerning this speech that Madison said (*id.* at 472):

> If the power is not immediately derived from the people, in proportion to their numbers we may make a paper confederacy, but that will be all.

Alexander Hamilton likewise supported apportionment based solely on population (I Farrand 465–466):

> Mr. Hamilton observed that individuals forming political Societies modify their rights differently, with regard to suffrage. Examples of it are found in all the States. In all of them some individuals are deprived of the right altogether, not having the requisite qualification of property. * * * In like manner States may modify their right of suffrage differently, the larger exercising a larger, the smaller a smaller share of it. But as States are a collection of individual men which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition. Nothing could be more preposterous or absurd than to sacrifice the former to the latter. It has been sd. that if the smaller States renounce their *equality*, they renounce at the same time their *liberty*. The truth is it is a contest for power, not for liberty. Will the men composing the small States be less free than those composing the larger. The State of Delaware having 40,000 souls will *lose power*, if she has $\frac{1}{10}$ only of the votes allowed to Pa. having 400,000: but will the people of Del: *be less free*, if each citizen has an equal vote with each citizen of Pa. He admitted that common residence within the same State would produce a certain degree of attachment; and that this principle might have a certain influence in public affairs.. He thought however that this might by some precautions be in a great measure excluded: and that no material inconvenience could result from it, as there could not be any ground for combination among the States whose influence was most dreaded. * * * No considerable inconvenience had been found from the

> division of the State of N. York into different districts of different sizes.[11]

Yates gives this account of Hamilton's speech (*id.* at 473):

> The question, after all is, is it our interest in modifying this general government to sacrifice individual rights to the preservation of the rights of an *artificial* being, called states? There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government. If therefore three states contain a majority of the inhabitants of America, ought they to be governed by a minority? * * * [The larger States] are to surrender their rights—for what? for the preservation of an artificial being. We propose a free government—Can it be so if partial distinctions are maintained? * * * In the state of New York, five counties from a majority of representatives, and yet the government is in no danger, because the laws have a general operation. The small states exaggerate their danger, and on this ground contend for an undue proportion of power.

Elbridge Gerry of Massachusetts also agreed with Madison (I Farrand 467):

> [W]e never were independent States, were not such now, & never could be even on the principles of the Confederation. The States & the advocates for them were intoxicated with the idea of their *sovereignty*. He was a member of Congress at the time the federal articles were formed. The injustice of allowing each

[11] Both houses of the New York legislature were then apportioned on the basis of eligible voters. New York Constitution of 1777, Articles 4, 12.

> State an equal vote was long insisted on. He voted for it, but it was agst. his Judgment, and under the pressure of public danger, and the obstinacy of the lesser States.

Luther Martin replied to Gerry that (*id.* at 468):

> [T]he language of the States being *Sovereign & independent,* was once familiar & understood; though it seemed now so strange & obscure. He read those passages in the articles of Confederation which describe them in that language.

The convention rejected the motion of Robert Lansing to have the first branch elected on same basis as the Congress of the Confederation, *i.e.*, equal representation by States, by a vote of 6 to 4 with one State divided. By the converse vote, the convention adopted the resolution reported by the Committee of the Whole "that the rule of suffrage in the 1st branch ought not to be according to that established by the Articles of Confederation." (I Farrand 468.) Oliver Ellsworth of Connecticut then again proposed the compromise first suggested by Sherman (*id.* at 468–469):

> * * * that the rule of suffrage in the 2d. branch. be the same with that established by the articles of confederation". He was not sorry on the whole he said that the vote just passed, had determined against this rule in the first branch. He hoped it would become a ground of compromise with regard to the 2d. branch. We were partly national; partly federal. The proportional representation in the first branch was conformable to the national principle & would secure the large States agst. the small. An equality of voices was conformable to the federal principle and was necesary to secure the Small States agst. the large. He trusted that on this middle ground a compromise would take place. He did not see that it could on any

> other. * * * The existing confederation was founded on the equality of the States in the article of suffrage: was it meant to pay no regard to this antecedent plighted faith.

Abraham Baldwin of Georgia opposed Ellsworth's motion on the ground that the second house should represent property. (*Id.* at 469–470.) George Read of Delaware agreed in part with Madison and Hamilton (*id.* at 471):

> If [the government was to be] more national, I would be for a representation proportionate to population. [Yates]

James Wilson, on June 30th, strongly opposed Ellsworth's motion to allow each State an equal vote in the second branch. He rejected threats that convention would otherwise fail (I Farrand 482–484):

> If the minority of the people of America refuse to coalesce with the majority on just and proper principles, if a separation must take place, it could never happen on better grounds. The votes of yesterday agst. the just principle of representation, were as 22 to 90 of the people of America. Taking the opinions to be the same on this point, * * * the question will be shall less than ¼ of the U. States withdraw themselves from the Union, or shall more than ¾ renounce the inherent, indisputable, and unalienable rights of men, in favor of the artificial systems of States. If issue must be joined, it was on this point he would chuse to join it. The gentleman from Connecticut [Ellsworth] in supposing that the prepondenancy secured to the majority in the 1st. branch had removed the objections to an equality of votes in the 2d. branch for the security of the minority narrowed the case extremely. Such an equality will enable the minority to controul in all cases whatsoever, the sentiments and interests of the

majority. Seven States will controul six; seven States according to the estimates that had been used, composed 24/90 of the whole people. It would be in the power of less than 1/3 to overrule 2/3 whenever a question should happen to divide the States in that manner. Can we forget for whom we are forming a Government? Is it for *men*, or for the imaginary beings called States? Will our honest Constituents be satisfied with metaphysical distinctions? Will they, ought they to be satisfied with being told that one third, compose the greater number of States. The rule of suffrage ought on every principle to be the same in the 2d. as in the 1st. branch. * * * If the motion should be agreed to, we shall leave the U.S. fettered precisely as heretofore; with the additional mortification of seeing the good purposes of ye fair representation of the people in the 1st. branch, defeated in 2d. Twenty four will still controul sixty six.

Ellsworth replied that (*id.* at 484-485):

The capital objection of Mr. Wilson "that the minority will rule the majority" is not true. The power is given to the few to save them from being destroyed by the many. If an equality of votes had been given to them in both branches, the objection might have had weight. * * * No instance [of a confederacy][12] has existed in which an equality of voices has not been exercised by the members of it. We are running from one extreme to another. We are razing the foundations of the building. When we need only repair the roof. No salutary measure has been lost for want of *a majority of the States*, to favor it. If security be all that the great States wish for the 1st. branch secures them. * * * He appealed again to the

[12] Farrand has taken this phrase from the account of Yates. I Farrand 484, note 5.

> obligations of the federal pact which was still in force, and which had been entered into with so much solemnity, persuading himself that some regard would still be paid to the plighted faith under which each State small as well as great, held an equal right of suffrage in the General Councils.

Supporting Wilson, Madison said that speakers had urged (*id.* at 486):

> * * * continually that an equality of votes in the 2d. branch was not only necessary to secure the small, but would be perfectly safe to the large ones whose majority in the 1st. branch was an effectual bulwark. But notwithstanding this apparent defence, the Majority of States might still injure the majority of people. 1. they could *obstruct* the wishes and interests of the majority. 2. they could *extort* measures, repugnant to the wishes & interest of the majority. 3. They could *impose* measures adverse thereto; as the 2d branch will probly exercise some great powers, in which the 1st will not participate.

William Richardson Davie of North Carolina agreed with Ellsworth, opposing the resolution approved by the Committee of the Whole (I Farrand 487–488):

> The Report of the Committee allowing the Legislatures to choose the Senate, and establishing a proportional representation in it, seemed to be impracticable. There will according to this rule be ninety members in the outset, and the number will increase as new States are added. It was impossible that so numerous a body could possess the activity and other qualities required in it. * * * [I]f a proportional representation was attended with insuperable difficulties, the making the Senate the Representative of the States, looked like bringing us back to Congs. again, and shutting out all the advan-

> tages expected from it. * * * He thought that in general there were extremes on both sides. We were partly federal, partly national in our Union. And he did not see why the Govt. might not in some respects operate on the States, in others on the people.

Attempting to meet Davie's objection, Wilson (*id.* at 488):

> * * * admitted the question concerning the number of Senators, to be embarrassing. If the smallest States be allowed one, and the others in proportion, the Senate will certainly be too numerous. He looked forward to the time when the smallest States will contain 100,000 souls at least. Let there be then one Senator in each for every 100,000 souls, and let the States not having that no. of inhabitants be allowed one. He was willing himself to submit to this temporary concession to the small States: and threw out the idea as a ground of compromise.

Benjamin Franklin then summarized the debate (I Farrand 488):

> The diversity of opinions turns on two points. If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large States say their money will be in danger. When a broad table is to be made, and the edges of planks do not fit the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands, in order that they may join in some accommodating proposition.

To resolve the impasse, he proposed the following resolution (*id.* at 489):

> That the Legislatures of the several States shall choose & send an equal number of Dele-

> gates, namely who are to compose the 2d. branch of the General Legislature—

However, while the resolution also gave each State an equal voice on several important issues involving the States such as issues affecting their sovereignty, voting strength was to be calculated by taxes paid with regard to appropriations bills. Benjamin Franklin explained that (*id.* at 499):

> Let the senate be elected by the states equally—in all acts of sovereignty and authority, let the votes be equally taken—the same in the appointment of all officers, and salaries; but in passing of laws, each state shall have a right of suffrage. in proportion to the sums they respectively contribute. [Yates]

Rufus King rejected all proposals for giving each State an equal vote and said that he was (I Farrand 489–490):

> filled with astonishment that if we were convinced that every *man* in America was secured in all his rights, we should be ready to sacrifice this substantial good to the phantom of *State* sovereignty: * * * that he could not therefore but repeat his amazement that when a just Govermt. founded on a fair representation of the *people* of America was within our reach, we should renounce the blessing, from an attachment to the ideal freedom & importance of *States:* that should this wonderful illusion continue to prevail, his mind was prepared for every event, rather than sit down under a Govt. founded in a vicious principle of representation and which must be as shortlived as it would be unjust. He might prevail on himself to accede to some such expedient as had been hinted by Mr. Wilson: but he never could listen to an equality of votes as proposed in the motion.

Also opposing both Ellsworth's and Franklin's compromises, Gunning Bedford of Delaware supported complete equality between the States (*id.* at 490–492):

> [T]here was no middle way between a perfect consolidation and a mere confederacy of the States. The first is out of the question, and in the latter they must continue if not perfectly, yet equally sovereign. * * * Look at G. Britain. Is the Representation there less unequal? But we shall be told again that that is the rotten part of the Constitution. Have not the boroughs however held fast their constitutional rights? and are we to act with greater purity than the rest of mankind. An exact proportion in the Representation is not preserved in any one of the States. Will it be said that an inequality of power will not result from an inequality of votes. Give the opportunity, and ambition will not fail to abuse it. * * * The little States are willing to observe their engagements, but will meet the large ones on no ground but that of the Confederation.

Yates says that Bedford stated (*id.* at 501–502):

> Let us then do what is in our power—*amend and enlarge the Confederation but not alter the Federal system.* [Emphasis in original.]

On July 1st, George Washington, the chairman of the convention, wrote David Stuart that (III Farrand 51):

> the primary cause of all our disorders lies in the different State Governments, and in the tenacity of that power which pervades the whole of their systems. Whilst independent sovereignty is so ardently contended for, whilst the local views of each State and seperate interests by which they are too much govern'd

> will not yield to a more enlarged scale of politicks * * *.

The convention voted on July 2, 1787, 5 to 5, with one State divided, on Ellsworth's motion to give each State one vote in the Senate. Connecticut, New York, New Jersey, Delaware, and Maryland voted for the resolution and Georgia was divided. I Farrand 510. While he said that "[e]quality of suffrage in the states is wrong" [Yates] (*id.* at 516), Charles Cotesworth Pinckney of South Carolina proposed that a committee be appointed of one member from each State to devise a compromise. Luther Martin did not object but warned that "no modifications whatever could reconcile the Smaller States to the least diminution of their equal Sovereignty." *Id.* at 511. Elbridge Gerry, who favored the population basis of apportionment, supported the committee because "[w]e must make concessions on both sides." *Id.* at 515. The convention approved the creation of the committee 9 States to 2.

On July 2, Phineas Bond wrote Lord Carmarthen that the problem was (III *id.* at 52–53):

> * * * to form such a federal constitution, as will give energy and consequence to the union. Whether this is to be done by improving the old governments or by substituting new ones—whether by continuing a power in each State to regulate its internal policy, or to abolish all separate establishments, and to form one grand federal authority, is a matter of consideration which creates much doubt and animadversion.

Yates gives the following account of the meeting of the newly formed Committee on Representation in the Legislature on July 3d (I Farrand 522):

> Many of the members, impressed with the utility of a general government, connected with it

> the indispensible necessity of a representation from the states *according to their numbers and wealth;* while others, equally tenacious of the rights of the states, would admit of no other representation but such *as was strictly federal,* or in other words, *equality of suffrage.*

The committee agreed to a motion by Benjamin Franklin providing that one representative shall be apportioned in the first branch for each 40,000 people with a minimum of one for each State; that all bills for raising or apportioning money must arise in that house and may not be amended by the second branch; and that each State shall have an equal vote in the second house. *Id.* at 523.

On July 5th, the convention debated the committee's report. Madison continued to oppose any compromise deviating from apportionment based on population (I Farrand 527–528):

> He conceived that the Convention was reduced to the alternative of either departing from justice in order to conciliate the smaller States, and the minority of the people of the U.S. or of displeasing these by justly gratifying the larger States and the majority of the people. He could not himself hesitate as to the option he ought to make. The Convention with justice & the majority of the people on their side, had nothing to fear. With injustice and the minority on their side they had every thing to fear. It was in vain to purchase concord in the Convention on terms which would perpetuate discord among their Constituents. The Convention ought to pursue a plan which would bear the test of examination, which would be espoused & supported by the enlightened and impartial part of America, & which they could themselves vindicate & urge.

Yates' report of this speech states (*id.* at 535):

> We are driven to an unhappy dilemma. Two thirds of the inhabitants of the union are to please the remaining one third by sacrificing their essential rights.

Pierce Butler of South Carolina agreed that (*id.* at 529):

> * * * he could not let down his idea of the people. of America so far as to believe they, would from mere respect to the Convention adopt a plan evidently unjust. * * * He urged that the 2d. branch ought to represent the States according to their property.

In contrast, Elbridge Gerry supported the compromise (*id.* at 532):

> We were however in a peculiar situation. We were neither the same Nation nor different Nations. We ought not therefore to pursue the one or the other of these ideas too closely. If no compromise should take place what will be the consequence. A secession he foresaw would take place; for some gentlemen seem decided on it; two different plans will be proposed, and the result no man could foresee. If we do not come to some agreement among ourselves some foreign sword will probably do the work for us.

George Mason likewise said that (*id.* at 533):

> There must be some accomodation on this point, or we shall make little further progress in the work. Accomodation was the object of the House in the appointment of the Committee; and of the Committee in the Report they had made. And however liable the Report might be to objections, he thought it preferable to an appeal to the world by the different sides, as had been talked of by some Gentlemen.

The convention then turned in particular to the first clause of the resolution which stated that one representative shall be apportioned to every 40,000 people. Gouverneur Morris of Pennsylvania objected to this provision both because it was based on population rather than wealth and because the Atlantic Coast states could be out-voted in the future (I Farrand 533–534):

> He thought property ought to be taken into the estimate as well as the number of inhabitants. Life and liberty were generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property was the main object of Society. * * * He thought the rule of representation ought to be so fixed as to secure to the Atlantic States a prevalence in the National Councils. The new States will know less of the public interest than these, will have an interest in many respects different, in particular will be little scrupulous of involving the Community in wars the burdens & operations of which would fall chiefly on the maritime States. Provision ought therefore to be made to prevent the maritime States from being hereafter outvoted by them. He thought this might be easily done by irrevocably fixing the number of representatives which the Atlantic States should respectively have, and the number which each new State will have. This wd. not be unjust, as the western settlers wd. previously know the conditions on which they were to possess their lands.[13]

Agreeing, John Rutledge of South Carolina said that (*id.* at 534):

> The gentleman last up had spoken some of his sentiments precisely. Property was cer-

[13] The fear that the western States would ultimately control the legislature was expressed repeatedly during the convention but no limit was ultimately placed on the representation of new States in either house.

> tainly the principal object of Society. If numbers should be made the (rule of representation, the Atlantic States will be subjected to the Western. He moved that the first proposition in the report be postponed in order to take up the following viz. "that the suffrages of the several States be regulated and proportioned according to the sums to be paid towards the general revenue by the inhabitants of each State respectively * * *.

Rutledge's motion was rejected with only South Carolina supporting it.

On July 6th Gouverneur Morris (I Farrand 540):

> * * * moved to commit [back to the committee] so much of the Report as relates to "1 member for every 40,000 inhabitants": His view was that they might absolutely fix the number for each State in the first instance; leaving the Legislature at liberty to provide for changes in the relative importance of the States, and for the case of new States.

This view was opposed by Nathaniel Gorham of Massachusetts who (*ibid.*):

> * * * apprehended great inconveniency from fixing directly the number of Representatives to be allowed to each State. He thought the number of Inhabitants the true guide; tho' perhaps some departure might be expedient from the full proportion.

Elbridge Gerry (*id.* at 541):

> * * * favored the Commitment and thought that Representation ought to be in the Combined ratio of numbers of Inhabitants and of wealth, and not of either singly.

Agreeing with Gorham "that the Ratio of Representation proposed could not be safely fixed, since in a century & a half our computed increase of population

would carry the number of representatives to an enormous excess," Rufus King said that wealth not population should be the basis of apportionment (I Farrand 541):

> * * * ye. number of inhabitants was not the proper index of ability & wealth; that property was the primary object of Society; and that in fixing a ratio this ought not to be excluded from the estimate. With regard to New States, he observed that there was something peculiar in the business which had not been noticed. The U.S. were now admitted to be proprietors of the Country, N. West of. the Ohio. Congs. by one of their ordinances have impoliticly laid it out into ten States, and have made it a fundamental article of compact with those who may become settlers, that as soon as the number in any one State shall equal that of the smallest of the 13 original States, it may claim admission into the Union. Delaware does not contain it is computed more than 35,000 souls, and for obvious reasons will not increase much for a considerable time. It is possible then that if this plan be persisted in by Congs. 10 new votes may be added, without a greater addition of inhabitants than are represented by the single vote of Pena.

Pierce Butler of South Carolina also supported wealth as the proper standard (*id.* at 541–542):

> He was persuaded that the more the subject was examined, the less it would appear that the number of inhabitants would be a proper rule of proportion. If there were no other objection the changeableness of the standard would be sufficient. He concurred with those who thought some balance was necessary between the old & New States. He contended strenuously that property was the only just measure of representation. This was the great object of Governt: the great cause of war, the great means of carrying it on.

On the other hand, Charles Pinckney (*id.* at 542):

> * * * saw no good reason for committing. The value of land had been found on full investigation to be an impracticable rule. The contributions of revenue including imports & exports, must be too changeable in their amount; too difficult to be adjusted; and too injurious to the noncommercial States. The number of inhabitants appeared to him the only just & practicable rule.

William Richardson Davie of North Carolina proposed a compromise between population and state equality (*ibid.*):

> He seemed to think that wealth or property ought to be represented in the 2d. branch; and numbers in the 1st. branch.

The convention voted 7 States to 3, with one State divided, to refer the first sentence of the resolution of the Committee on Representation in the Legislature to a new five-man special committee. The clause requiring appropriation and tax bills to originate in the first branch was passed 5 to 3 with 3 States divided. I Farrand 538–539. James Wilson then (id. at 542):

> * * * signified that his views in agreeing to the Commitmt. was that the Come might consider the propriety of adopting a scale similar to that established by the Constitution of Masts. [see p. 18, note 9 above] which wd give an advantage to ye. small States without substantially departing from a rule of proportion.

After debate began on the clause of the committee's report concerning the origination of tax and appropriation bills, George Mason said (*id.* at 544):

> He was a friend to proportional representation in both branches; but supposed that some points must be yielded for the sake of accommodation.

When debate began on July 7th, Elbridge Gerry said that the issue of representation was (I Farrand 550):

> * * * the critical question. He had rather agree to it than have no accommodation. A Governt. short of a proper national plan if generally acceptable, would be preferable to a proper one which if it could be carried at all, would operate on discontented States.

The convention then approved the committee resolution giving each State an equal vote in the second house 6 States to 3 (Pennsylvania, South Carolina, and Virginia), with two States divided. After debate was renewed, William Paterson, who introduced the New Jersey plan, said that he (*id.* at 551):

> * * * considered the mode & rule of representation in the 1st. branch as [a concession] and that after the establishment of that point, the small States would never be able to defend themselves without an equality of votes in the 2d. branch. There was no other ground of accomodation. His resolution was fixt. He would meet the large States on that Ground and no other. For himself he should vote agst. the Report, because it yielded too much [the origination of appropriations and revenue bills in the 1st house].

Gouverneur Morris was also opposed to the report but for entirely different reasons (I Farrand 551-552):

> He was agst. the Report because it maintained the improper Constitution of the 2d. branch. It made it another Congress, a mere whisp of straw. It had been sd. (by Mr. Gerry) that the new Governt. would be partly national, partly federal; that it ought in the first quality to protect individuals; in the second, the States. But in what quality was it to protect the aggregate interest of the whole. Among the many

> provisions which had been urged, he had seen none for supporting the dignity and splendor of the American Empire. It had been one of our greatest misfortunes that the great objects of the nation had been sacrificed constantly to local views; in like manner as the general interests of States had been sacrificed to those of the Counties. * * * They were originally nothing more than colonial corporations. On the declaration of Independence, a Governmt. was to be formed. The small States aware of the necessity of preventing anarchy, and taking advantage of the moment, extorted from the large ones an equality of votes. Standing now on that ground, they demand under the new system greater rights as men, than their fellow Citizens of the large States. The proper answer to them is that the same necessity of which they formerly took advantage does not now exist, and that the large States are at liberty now to consider what is right, rather than what may be expedient.

James Madison agreed with Morris (*id.* at 554):

> An Equality of votes in ye. Senate will enable a *minority* to hold the Majority—they will compel the majority to submit to ther particular Interest or they will withhold their Assent to essential & necessary measures * * *. [King]

The report of the special committee on July 9th proposed that the number of representatives in the first branch be specified in the constitution, but that the legislature could change this apportionment "upon the principles of * * * wealth and number of inhabitants." I Farrand 558. Roger Sherman inquired (*id.* at 559):

> * * * on what principles or calculations the Report was founded. It did not appear to

> correspond with any rule of numbers, or of any requisition hitherto adopted by Congs.

Nathaniel Gorham responded that (*id.* at 559–560):

> The number of blacks & whites with some regard to supposed wealth was the general guide. Fractions could not be observed. The Legislre. is to make alterations from time to time as justice & propriety may require. Two objections prevailed agst the rate of 1 member for every 40,000 inhts. The 1st. was that the Representation would soon be too numerous: the 2d. that the Westn. States who may have a different interest, might if admitted on that principle by degrees, out-vote the Atlantic. Both these objections are removed. The number will be small in the first instance and may be continued so, and the Atlantic States having ye. Govt. in their own hands, may take care of their own interest, by dealing out the right of Representation in safe proportions to the Western States.

The convention then approved 9 States to 2 (New York and New Jersey opposing) the clause allowing the legislature to apportion in the future on the basis of wealth and inhabitants. *Id.* at 560.

Debate started on a motion to refer the first clause of the report concerning the initial apportionment to a committee with one member from each State. I Farrand 560. Hugh Williamson again expressed fear of the new, western States (*ibid.*):

> Mr. Williamson. thought it would be necessary to return to the rule of numbers. but that the Western States stood on different footing. If their property shall be rated as high as that of the Atlantic States, then their representation ought to hold a like proportion. Otherwise if their property was not to be equally rated.

In trying to explain the basis on which the committee based the first apportionment, Gouverneur Morris said (*id.* at 560–561):

> The Report is little more than a guess. Wealth was not altogether disregarded by the Come. Where it was apparently in favor of one State whose nos. were superior to the numbers of another, by a fraction only, a member extraordinary was allowed to the former: and so vice versa.

George Read of Delaware (*id.* at 561):

> * * * asked why Georgia was allowed 2 members, when her number of inhabitants had stood below that of Delaware.

Defending the apportionment, Gouverneur Morris replied (*ibid.*):

> Such is the rapidity of the population of that State, that before the plan takes effect, it will probably be enitled to 2 Representatives.

Governor Edmund Randolph of Virginia said that he disliked the committee report (I Farrand 561):

> He was apprehensive that as the number was not to be changed till the Natl. Legislature should please, a pretext would never be wanting to postpone alterations, and keep the power in the hands of those possessed of it. He was in favor of the commitmt. to a member from each State.

William Paterson, although the originator of the small-state plan, objected to the report in terms suggesting his appreciation of the importance of a population standard for apportioning one house (*ibid.*):

> Mr. Patterson considered the proposed estimate for the future according to the Combined rule of numbers and wealth, as too vague. For this reason N. Jersey was agst. it. He could

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> regard negroes slaves in no light but as property. They are no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, & like other property entirely at the will of the Master. Has a man in Virga. a number of votes in proportion to the number of his slaves? and if Negroes are not represented in the States to which they belong, why should they be represented in the Genl. Govt. What is the true principle of Representation? It is an expedient by which an assembly of certain individls. chosen by the people is substituted in place of the inconvenient meeting of the people themselves.

Seeing the anomaly of Paterson's position, Madison pointed out (*id.* at 562):

> * * * that his doctrine of Representation which was in its principle the genuine one, must for ever silence the pretensions of the small States to an equality of votes with the large ones. They ought to vote in the same proportion in which their citizens would do, if the people of all the States were collectively met. He suggested as a proper ground of compromise, that in the first branch the States should be represented according to their number of free inhabitants: And in the 2d. which had for one of its primary objects the guardianship of property, according to the whole number, including slaves.

The convention approved 9 States to 2 referring the first clause of the report to a new committee. *Ibid.*

The next day, July 10th, Edmund Randolph submitted a plan to conciliate the small States on the issue of the apportionment of the second branch. He proposed that the vote in the second branch be by States with each State counting equally on certain issues such as navigation of rivers and regulating coin

while "in all other cases the right of suffrage be proportioned according to an equitable rule of representation." III Farrand 56. Also, on July 10th, the committee on representation reported a proposal for a new initial apportionment of the 1st house, this time having 65 members instead of the former 56. I *id.* at 563. John Rutledge of South Carolina made a motion that New Hampshire "be reduced from 3 to 2 members" on the ground that "[h]er numbers did not entitle her to 3 and it was a poor State." *Id.* at 566. In reply, Rufus King stated (*ibid.*):

> N. Hamshire has probably more than 120,000 Inhabts. and has an extensive country of tolerable fertility. Its inhabts therefore may be expected to increase fast. He remarked that the four Eastern States having 800,000 souls, have 1/3 fewer representatives than the four Southern States, having not more than 700,000 souls rating the blacks, as 5 for 3. The Eastern peo- will advert to these circumstances, and be dissatisfied. He believed them to be very desirous of uniting with their Southern brethren but did not think it prudent to rely so far on that disposition as to subject them to any gross inequality.

After the amendments proposed by Rutledge and others were rejected, the convention approved the committee's apportionment 9 States to 2. *Id.* at 570.

Governor Randolph then proposed an amendment (I Farrand 570–571):

> that in order to ascertain the alterations in the population & wealth of the several States the Legislature should be required to cause a census, and estimate to be taken within one year after its first meeting; and every [illegible] years thereafter—and that the Legislre. arrange the Representation accordingly.

The amendment was opposed by Gouverneur Morris on the ground that it fettered (*id.* at 571):

> * * * the Legislature too much. * * * He dwelt much on the danger of throwing such a preponderancy into the western Scale, suggesting that in time the Western people wd. outnumber the Atlantic States. He wished therefore to put it in the power of the latter to keep a majority of votes in their own hands. It was objected he said that if the Legislre. are left at liberty, they will never readjust the Representation. He admitted that this was possible, but he did not think it probable unless the reasons agst. a revision of it were very urgent & in this case, it ought not to be done.

Debate resumed on Randolph's proposal on July 11th. George Mason both rejected fears of western control and argued for a clear standard of apportionment based on population (I Farrand 578–579):

> The greater the difficulty we find in fixing a proper rule of Representation, the more unwilling ought we to be, to throw the task from ourselves, on the Genl. Legislre. He did not object to the conjectural ratio which was to prevail in the outset; but considered a Revision from time to time according to some permanent & precise standard as essential to ye. fair representation required in the 1st. branch. According to the present population of America, the Northn. part of it had a right to preponderate, and he could not deny it. But he wished it not to preponderate hereafter when the reason no longer continued. From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it. On the Contrary we know they will always when they can rather increase it. If the S. States therefore should have ¾ of the people of America within their limits, the Northern will

> hold fast the majority of Representatives. ¼ will govern the ¾. The S. States will complain: but they may complain from generation to generation without redress. Unless some principle therefore which will do justice to them hereafter shall be inserted in the Constitution, disagreeable as the declaration was to him, he must declare he could neither vote for the system here nor support it, in his State. Strong objections had been drawn from the danger to the Atlantic interests from new Western States. Ought we to sacrifice what we know to be right in itself, lest it should prove favorable to States which are not yet in existence. If the Western States are to be admitted into the Union as they arise, they must, he wd. repeat, be treated as equals, and subjected to no degrading discriminations. * * * He urged that numbers of inhabitants: though not always a precise standard of wealth was sufficiently so for every substantial purpose.

Hugh Williamson of North Carolina proposed a substitute to Randolph's resolution (*id.* at 579):

> "that in order to ascertain the alternations that may happen in the population & wealth of the several States, a census shall be taken of the free white inhabitants and 4/5ths of those of other descriptions on the 1st year after this Government shall have been adopted and every year thereafter; and that the Representation be regulated accordingly."

After agreeing to the substitution, Randolph (*id.* at 579–580):

> * * * observed that the ratio fixt for the 1st. [legislature] was a mere conjecture, that it placed the power in the hands of that part of America, which could not always be entitled to it, that this power would not be voluntarily renounced; and that it was consequently the duty of the Convention to secure its renunciation

> when justice might so require; by some constitutional provisions. If equality between great & small States be inadmissible, because in that case unequal numbers of Constituents wd. be represented by equal numbers of votes; was it not equally inadmissible that a larger & more populous district of America should hereafter have less representation, than a smaller & less populous district. If a fair representation of the people be not secured, the injustice of the Govt. will shake it to its foundations. What relates to suffrage is justly stated by the celebrated Montesquieu, as a fundamental article in Republican Govts.

John Rutledge then repeated his contention that wealth should be considered in apportionment (*id.* at 582):

> Mr. Rutlidge [sic] contended for the admission of wealth in the estimate by which Representation should be regulated. The Western States will not be able to contribute in proportion to their numbers, they shd. not therefore be represented in that proportion. The Atlantic States will not concur in such a plan. He moved that "at the end of years after the 1st. meeting of the Legislature, and of every years thereafter, the Legislature shall proportion the Representation according to the principles of wealth & population"

Roger Sherman opposed considering wealth (*ibid.*):

> Mr. Sherman thought the number of people alone the best rule for measuring wealth as well as representation; and that if the Legislature were to be governed by wealth, they would be obliged to estimate it by numbers.

Returning to his fear of the West, Gouverneur Morris argued much like those who now claim that rural areas are entitled to no representation because rural

people are better at running a government (I Farrand 583):

> The Busy haunts of men not the remote wilderness, was the proper School of political Talents. If the Western people get the power into their hands they will ruin the Atlantic interests. The Back members are always most averse to the best measures. He mentioned the case of Pena. formerly. The lower part of the State had ye. power in the first instance. They kept it in yr. own hands. & the country was ye. better for it.[14]

Madison opposed any proposals designed to limit western representation (*id.* at 584–585):

> The case of Pena. had been mentioned where it was admitted that those who were possessed of the power in the original settlement, never admitted the new settlmts. to a due share of it. England was a still more striking example. The power there had long been in the hands of the boroughs, of the minority; who had opposed & defeated every reform which had peen attempted. Virga. was in a lesser degree another example. With regard to the Western States, he was clear & firm in opinion that no unfavorable distinctions were admissible either in point of justice or policy. * * * He could not agree that any substantial objection lay agst. fixig numbers for the perpetual standard of Representation. It was said that Representation & taxation were to go together; that taxation & wealth ought to go together, that population and wealth were not measures of each other. He ad-

[14] While Morris praised Pennsylvania for preventing the newly settled area from attaining power through malapportionment, it is significant that the convention rejected his view that a similar result should be attained by placing in the Constitution a limitation on the representation of new States.

> mitted that in different climates, under different forms of Govt. and in different stages of civilization the inference was perfectly just. He would admit that in no situation numbers of inhabitants were an accurate measure of wealth. He contended however that in the U. States it was sufficiently so for the object in contemplation.

George Mason supported the requirement of periodical reapportionment. He (*id.* at 586):

> * * * Agreed with Mr. Govr. Morris that we ought to leave the interests of the people to the Representatives of the people: but the objection was that the Legislature would cease to be the Representatives of the people. It would continue so no longer than the States now containing a majority of the people should retain that majority. As soon as the Southern & Western population should predominate, which must happen in a few years, the power wd be in the hands of the minority, and would never be yielded to the majority, unless provided for by the Constitution.

The convention adopted 6 States to 4 Williamson's proposal of a census for free inhabitants. *Ibid.* Subsequently, Williamson's entire resolution, however, was rejected 9 to 0 as different States opposed it for different reasons. *Id.* at 588.

On July 12, 1787, the convention debated a proposal to make taxation proportional to representation and to base representation on inhabitants and wealth. William Samuel Johnson of Connecticut contended (I Farrand 593):

> * * * that wealth and population were the true, equitable rule of representation; but he conceived that these two principles resolved themselves into one; population being the best measure of wealth.

On the other hand, Rufus King replied that (*id.* at 595):

> * * * he had still two powerful objections agst. tying down the Legislature to the rule of numbers. 1. they were at this time an uncertain index of the relative wealth of the States. 2. if they were a just index at this time it can not be supposed always to continue so.

Charles Pinckney then proposed that slaves be equal to whites in ascertaining representation (*id.* at 596):

> This he urged was nothing more than justice. The blacks are the labourers, the peasants of the Southern States: they are as productive of pecuniary resources as those of the Northern States. They add equally to the wealth, and considering money as the sinew of war, to the strength of the nation.

The convention adopted a resolution basing both direct taxation and representation on whites and 3/5 of the slaves and requiring a census within six years and subsequently every ten years. *Id.* at 597.

Edmund Randolph proposed on July 13th that the resolution passed on July 9th providing for the future apportionment of representatives on the basis of wealth and numbers be reconsidered. I Farrand 603. He submitted a resolution deleting the reference to wealth. During the debate on this resolution James Wilson strongly supported apportionment on the basis of population (*id.* at 605–606):

> Conceiving that all men wherever placed have equal rights and are equally entitled to confidence, he viewed without apprehension the period when a few States should contain the superior number of people. The majority of people wherever found ought in all questions to govern the minority. If the interior Country should acquire this majority they will not only have the right, but will avail themselves

of it whether we will or no. This jealousy misled the policy of G. Britain with regard to America. The fatal maxims espoused by her were that the Colonies were growing too fast, and that their growth must be stinted in time. What were the consequences? first: enmity on our part, then actual separation. Like consequences will result on the part of the interior settlements, if like jealousy & policy be pursued on ours. Further. if numbers be not a proper rule, why is not some better rule pointed out. No one has yet ventured to attempt it. Congs. have never been able to discover a better. No State as far as he had heard, has suggested any other. In 1783, after elaborate discussion of a measure of wealth all were satisfied then as they are now that the rule of numbers, does not differ much from the combined rule of numbers & wealth. Again he could not agree that property was the sole or the primary object of Governt. & Society. The cultivation & improvement of the human mind was the most noble object. With respect to this object, as well as to other *personal rights*, numbers were surely the natural & precise measure of Representation. And with respect to property, they could not vary much from the precise measure. In no point of view however could the establishmt. of numbers as the rule of representation in the 1st. branch vary his opinion as to the impropriety of letting a vicious principle into the 2d. branch.

Randolph's resolution passed 9 States to 0 with Delaware divided. *Id.* at 606.

On July 14th, Elbridge Gerry offered, and Rufus King seconded, the following resolution (II Farrand 3):

> that in order to secure the liberties of the States already confederated, the number of Representatives in the 1st branch of the States which shall hereafter be established shall never exceed

> in number, the Representatives from such of the States as shall accede to this confederation.

Gerry explained that he apprehended dangers from the western states. He was for admitting them (*ibid.*):

> * * * on liberal terms, but not for putting ourselves into their hands. They will if they acquire power like all men, abuse it. They will oppress commerce, and drain our wealth into the Western Country. To guard agst. these consequences, he thought it necessary to limit the number of new States to be admitted into the Union, in such a manner, that they should never be able to outnumber the Atlantic States.

Roger Sherman opposed the resolution (*ibid.*):

> We are providing for our posterity, for our children and our grand Children, who would be as likely to be citizens of new Western States, as of the old States. On this consideration alone, we ought to make no such discrimination as was proposed by the motion.

Gerry replied that (*ibid.*):

> There was a rage for emigration from the Eastern States to the Western Country and he did not wish those remaining behind to be at the mercy of the Emigrants. Besides foreigners are resorting to that Country, and it is uncertain what turn things may take there.

The proposal was rejected 5 to 4 with one State divided.

John Rutledge then proposed reconsideration of the resolution previously adopted giving equality of representation in the Senate and requiring money bills to originate in the first branch. II Farrand 3. Supporting reconsideration, James Wilson stressed (*id.* at 4):

> * * * when on the question concerning an equality of votes, the House was divided, our Constituents had they voted as their representatives did, would have stood as 2/3 agst. the equality,

> and ⅓ only in favor of it. This fact would ere long be known, and it will appear that this fundamental point has been carried by ⅓ agst. ⅔. What hopes will our constituents entertain when they find that the essential principles of justice have been violated in the outset of the Government: As to the privilege of originating money bills, it was not considered by any as of much moment, and by many as improper in itself. He hoped both clauses would be reconsidered. The equality of votes was a point of such critical importance, that every opportunity ought to be allowed, for discussing and collecting the mind of the Convention on it.

Luther Martin restated the threats he had invoked earlier in the convention (*ibid.*):

> He had rather there should be two Confederacies, than one founded on any other principle than an equality of votes in the 2d branch at least.

Charles Pinckney then moved (*id.* at 5):

> * * * that instead of an equality of votes the States should be represented in the 2d branch as follows: N.H. by 2 members, Mas 4. R.I. 1. Cont. 3. N.Y. 3. N.J. 2. Pa. 4. Del. 1. Md. 3. Virga. 5. N.C. 3. S.C. 3. Geo. 2. making in the whole 36.

James Madison supported the motion "as a reasonable compromise." *Ibid.*

Rufus King continued to demand apportionment based on population in both houses. He (II Farrand 6–7):

> * * * considered the proposed Government as substantially and formally, a General and National Government over the people of America. There never will be a case in which it will act as a federal Government on the States and not on

> the individual Citizens. And is it not a clear principle that in a free Govt. those who are to be the objects of a Govt. ought to influence the operations of it? What reason can be assigned why the same rule of representation sd. not prevail in the 2d branch as in the 1st? He could conceive none. On the contrary, every view of the subject that presented itself, seemed to require it. * * * [I]n N. York he had seen that the most powerful argument used by the considerate opponents to the grant of the Impost to Congress, was pointed agst. the viccious constitution of Congs. with regard to representation & suffrage. He was sure that no Govt. could last that was not founded on just principles. He preferred the doing of nothing, to an allowance of an equal vote to all the States. It would be better he thought to submit to a little more confusion & convulsion, than to submit to such an evil.

On the other hand, Caleb Strong of Massachusetts supported the compromise in the committee report rather than Pinckney's resolution (*id.* at 7–8):

> The Convention had been much divided in opinion. In order to avoid the consequences of it, an accomodation had been proposed. A Committee had been appointed; and though some of the members of it were averse to an equality of votes, a Report has been made in favor of it. It is agreed on all hands that Congress are nearly at an end. If no Accommodation takes place, the Union itself must soon be dissolved. * * * He thought the small States had made a considerable concession in the article of money bills, and that they might naturally expect some concessions on the other side. From this view of the matter he was compelled to give his vote for the Report taken all together.

James Madison (II Farrand 8–9):

> * * * expressed his apprehensions that if the proper foundation of Government was destroyed, by substituting an equality in place of a proportional Representation, no proper superstructure would be raised. * * * He reminded [the small States] of the consequences of laying the existing confederation on improper principles. * * * It had been very properly observed by Mr. Patterson [sic] that Representation was an expedient by which the meeting of the people themselves was rendered unnecessary; and that the representatives ought therefore to bear a proportion to the votes which their constituents if convened, would respectively have. Was not this remark as applicable to one branch of the Representation as to the other? But it had been said that the Governt. would in its operation be partly federal, partly national; that altho' in the latter respect the Representatives of the people ought to be in proportion to the people: yet in the former it ought to be according to the number of States. If there was any solidity in this distinction he was ready to abide by it, if there was none it ought to be abandoned. In all cases where the Genl. Governt. is to act on the people, let the people be represented and the votes be proportional. In all cases where the Governt. is to act on the States as such, in like manner as Congs. now act on them, let the States be represented & the votes be equal. This was the true ground of compromise if there was any ground at all. But he denied that there was any ground. He called for a single instance in which the Genl. Govt. was not to operate on the people individually. The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands. * * *

> He enumerated the objections agst. an equality of votes in the 2d branch, notwithstanding the proportional representation in the first; 1. the minority could negative the will of the majority of the people. 2. they could extort measures by making them a condition of their assent to other necessary measures. 3. they could obtrude measures on the majority by virtue of the peculiar powers which would be vested in the Senate. 4. the evil instead of being cured by time, would increase with every new State that should be admitted, as they must all be admitted on the principle of equality. 5. the perpetuity it would give to the preponderance of the Northn. agst. the Southn. Scale was a serious consideration.

James Wilson agreed with Madison (*id.* at 10):

> A vice in the Representation, like an error in the first concoction, must be followed by disease, convulsions, and finally death itself. The justice of the general principle of proportional representation has not in argument at least been yet contradicted.

Pinckney's motion was rejected 6 to 4 with Pennsylvania, Maryland, Virginia, and South Carolina in the minority. *Id.* at 11.

On July 16, 1787, the convention passed, 5 States to 4 (Pennsylvania, Virginia, South Carolina, and Georgia), with Massachusetts divided, a report from a committee providing for equality of representation among the States in the Senate. II Farrand 15. Edmund Randolph then proposed adjournment to allow "some conciliatory experiment" to be devised. *Id.* at 18. However, James Patterson stated that (*ibid.*):

> No conciliation could be admissible on the part of the smaller States on any other ground than that of an equality of votes in the 2d. branch.

Madison reports a meeting of the larger States the following day, July 17th (II Farrand 19–20):

> * * * for the purpose of consulting on the proper steps to be taken in consequence of the vote in favor of an equal Representation in the 2d. branch, and the apparent inflexibility of the smaller States on that point—Several members from the latter States also attended. * * * It appeared indeed that the opinions of the members who disliked the equality of votes differed so much as to the importance of that point, and as to the policy of risking a failure of any general act of the Convention by inflexibly opposing it. Several of them supposing that no good Governmt. could or would be built on that foundation, and that as a division of the Convention into two opinions was unavoidable it would be better that the side comprising the principal States, and a majority of the people of America, should propose a scheme of Govt. to the States, than that a scheme should be proposed on the other side, would have concurred in a firm opposition to the smaller States, and in a separate recommendation, if eventually necessary. Others seemed inclined to yield to the smaller States, and to concur in such an Act however imperfect & exceptionable, as might be agreed on by the Convention as a body, tho' decided by a bare majority of States and by a minority of the people of the U. States. It is probable that the result of this consultation satisfied the smaller States that they had nothing to apprehend from a Union of the larger, in any plan whatever agst. the equality of votes in the 2d. branch.

This finally settled the issue of representation in Congress, an issue on which the convention had nearly floundered.

Alexander Martin, a delegate from North Carolina, wrote Governor Caswell on July 24th that "it is no small task to bring to a conclusion the great objects

of a United Government viewed in different points by thirteen Independent Sovereignties; United America must have one general Interest to be a Nation, at the same time preserving the particular Interest of the Individual States." III Farrand 64–65. A few days later on August 1st, Pierce Butler of South Carolina wrote that the purpose of the convention was "to form a stronger Constitution on strict Foederal Principles, for the Governmt. of the whole * * *." *Id.* at 67.

On August 8th, during debate on the residence requirement for election to the House of Representatives, Gouverneur Morris favored no such requirement, but only a freehold. "Such a regulation is not necessary. People rarely chuse a nonresident—It is improper as in the 1st. branch; *the people at large,* not the *States* are represented" (emphasis in original). II Farrand 217. That same day, the report of the Committee on Detail amended without debate or objection the section concerning the apportionment of the 1st branch so as to provide "that each State shall have one representative at least." *Id.* at 222.

The next day, in discussing a provision that Congress has the power to regulate Congressional elections, James Madison implied clearly his view that apportionment of state legislatures on some basis other than population was unfair and that a provision was necessary in the new constitution to prevent the persons, who as a result of malapportionment, controlled state government from running Congressional elections to serve their own interests (*id.* at 241):

> Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presum-

> able that the Counties having the power in the former case would secure it to themselves in the latter.

On August 13th, George Mason supported the proposal that revenue bills must originate in House of Representatives and cannot be modified in Senate on the ground that (II Farrand 273–274):

> 1. The Senate did not represent the *people*, but the *States* in their political character. It was improper therefore that it should tax the people. * * * The House of Lords does not represent nor tax the people, because not elected by the people. * * * the pursestrings should be in the hands of the Representatives of the people.

Likewise on August 23d, James Madison, in the debate on the Senate's power as to treaties, said that "the Senate represented the States alone. * * *." II Farrand 392. During debate on August 30 on the power of the new government to admit new States, Luther Martin opposed a provision to allow the division of existing States only with the permission of those States. He suggested as the reason for his position that a minority of the States might control the newly settled areas through malapportionment (*id.* at 463):

> * * * Martin, urged the unreasonableness of forcing & guaranteeing the people of Virginia beyond the Mountains, the Western people, of N. Carolina. & of Georgia, & the people of Maine, to continue under the States now governing them, without the consent of those States to their separation. Even if they should become the *majority*, the majority of *Counties*, as in Virginia may still hold fast the dominion over them.

Much of the opposition on September 8th to the proposal that treaties must be ratified by two thirds of the Senate arose from the fact that a minority of the people will elect a majority of the Senators. Hugh Williamson of North Carolina (II Farrand 548):

> * * * remarked that Treaties are to be made in the branch of the Govt. where there may be a majority of the States without a majority of the people. Eight men may be a majority of a quorum, & should not have the power to decide the conditions of peace.

Elbridge Gerry similarly stressed (*ibid.*):

> * * * the danger of putting the essential rights of the Union in the hands of so small a number as a majority of the Senate, representing perhaps, not one fifth of the people.

On September 17, 1787, the Convention transmitted the proposed constitution to the Congress of the Confederation. II Farrand 665. The resolution stated that the Constitution should afterwards be submitted to a convention of delegates in each State for ratification. *Ibid.* After ratification by the conventions of nine States, the resolution stated that the Congress of the Confederation shall set a day and place for the election of President under the new constitution by the electors chosen in the various States. The letter accompanying both the proposed constitution and the resolution to the Congress of the Confederation stated that "[i]t is obviously impracticable in the federal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all—Individuals entering into society, must give up a share of liberty to preserve the rest." *Id.* at 666. On the other hand, the letter stated that the basic object of the convention was "the consolidation of our Union." *Id.* at 667.

The transmission of the proposed Constitution to the Congress of the existing Confederation, together with the language of the accompanying letter, demonstrate that the Constitution was viewed as a substantial modification to the Confederation in order to give greater power to the federal government at the expense of the independence of the States while at the same time not totally discarding the existing system by creating a national system in which state sovereignty was ended.

b. The Federalist Papers.—In Number 22 of the Federalist Papers, which was published on December 14, 1787, Alexander Hamilton attacked at some length equality of representation by States in the Continental Congress in his enumeration of the evils and weaknesses of the Confederation (*The Federalist* (Cooke ed., 1961),[15] pp. 138–139):

> The right of equal suffrage among the States is another exceptionable part of the confederation. Every idea of proportion, and every rule of fair representation conspire to condemn a principle, which gives to Rhode-Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New-York; and to Delaware, an equal voice in the national deliberations with Pennsylvania or Virginia, or North-Carolina. Its operation contradicts that fundamental maxim of republican government, which requires that the sense of the majority should prevail. Sophistry may reply, that sovereigns are equal, and that a majority of the votes of the States will be a majority of confederated America. But this kind of logical legerdemain will never counteract the plain suggestions of justice and common sense. It may happen that this majority of States is a small minority of the people of America; and two thirds of the

[15] Hereinafter referred to as "*The Federalist*."

people of America, could not long be persuaded, upon the credit of artificial distinctions and syllogistic subleties, to submit their interests to the management and disposal of one third. The larger States would after a while revolt from the idea of receiving the law from the smaller. To acquiesce in such a privation of their due importance in the political scale, would be not merely to be insensible to the love of power, but even to sacrifice the desire of equality. * * *

It may be objected to this, that not seven but nine States, or two thirds of the whole number must consent to the most important resolutions; and it may be thence inferred, that nine States would always comprehend a majority of the inhabitants of the Union. But this does not obviate the impropriety of an equal vote between States of the most unequal dimensions and populousness; nor is the inference accurate in point of fact; for we can enumerate nine States which contain less than a majority of the people; and it is constitutionally possible, that these nine may give the vote.

But this is not all; what at first sight may seem a remedy, is in reality a poison. To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is in its tendency to subject the sense of the greater number to that of the lesser number. Congress from the non-attendance of a few States have been frequently in the situation of a Polish Diet, where a single veto has been sufficient to put a stop to all their movements. A sixtieth part of the Union, which is about the proportion of Delaware and Rhode-Island, has several times been able to oppose an intire bar to its operations. This is one of those refinements which in practice has an effect the reverse of what is expected from it in theory. * * * In those emergencies of a nation, in which the goodness or badness, the weakness or strength of its government, is of

> the greatest importance, there is commonly a necessity for action. The public business must in some way or other go forward. If a pertinacious minority can controul the opinion of a majority respecting the best mode of conducting it; the majority in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will over-rule that of the greater, and give a tone to the national proceedings. Hence tedious delays—continual negotiation and intrigue—contemptible compromises of the public good. And yet in such a system, it is even happy when such compromises can take place: For upon some occasions, things will not admit of accommodation; and then the measures of government must be injuriously suspended or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savour of weakness—sometimes border upon anarchy.

Hamilton described in Number 32 the balance between the States and the federal government under the proposed constitution (*The Federalist*, pp. 199–200):

> An intire consolidation of the States into one complete national sovereignty would imply an intire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one

> instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant.*

In Number 39, James Madison similarly described the new system (*The Federalist*, pp. 254–255, 257):

> The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the Legislature of a particular State. So far the Government is *national* not *federal.* The Senate on the other hand will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal,* not *national.* * * *
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> * * * * * *
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> The proposed Constitution therefore is, in strictness neither a national nor a federal constitution; but a composition of both. In its foundation, it is federal, not national; in the sources from which the ordinary powers of the Government are drawn, it is partly federal, and partly national: in the operation of these powers, it is national, not federal: In the extent of them again it is federal, not national: And finally, in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national.

He repeated in Number 40 that the States continued to be independent sovereigns under the new constitution (*id.* at 262):

> We have seen that in the new government as in the old, the general powers are limited, and that the States in all unenumerated cases, are

> left in the enjoyment of their sovereign and independent jurisdiction.

See also *id.* at 261. Likewise, in Number 45, Madison said that "the States will retain under the proposed Constitution a very extensive portion of active sovereignty * * *" (*id.* at 310) and that (*id.* at 311–312):

> The State Governments may be regarded as constituent and essential parts of the federal Government; whilst the latter is nowise essential to the operation or organisation of the former. Without the intervention of the State Legislatures the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps in most cases of themselves determine it. The Senate will be elected absolutely and exclusively by the State Legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State Legislatures. Thus each of the principal branches of the federal Government will owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them. On the other side, the component parts of the State Governments will in no instance be indebted for their appointment to the direct agency of the federal government, and very little if at all, to the local influence of its members.

In Number 54, Madison explained the basis for the apportionment of the House of Representatives (*The Federalist*, pp. 366, 368):

> It is not contended that the number of people in each State ought not to be the standard for

> regulating the proportion of those who are to represent the people of each State. * * * [T]he rule is understood to refer to the personal rights of the people, with which it has a natural and universal connection. * * *
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> * * * * * *
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> * * * It is agreed on all sides, that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation.

This proposition seemed to Madison, Hamilton, and John Jay, the writers of the Federalist Papers, to be so self-evident that this is the entire discussion devoted to the basic principle of apportioning one of the two houses of the legislature in their detailed exposition of the proposed constitution.

In contrast, Madison apparently felt compelled to explain the apportionment of the Senate at length in Number 62 (*The Federalist*, pp. 416–417):

> The equality of representation in the senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small states, does not call for much discussion. If indeed it be right that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government; and that among independent and sovereign states bound together by a simple league, the parties however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason, that in a compound republic partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation. But it is superfluous to try by the standards of theory, a part of the constitution which is allowed on all hands to be the result not of theory, but "of a spirit of amity, and that

> mutual deference and concession which the peculiarity of our political situation rendered indispensable." A common government with powers equal to its objects, is called for by the voice, and still more loudly by the political situation of America. A government founded on principles more consonant to the wishes of the larger states, is not likely to be obtained from the smaller states. The only option then for the former lies between the proposed government and a government still more objectionable. Under this alternative the advice of prudence must be, to embrace the lesser evil; and instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice.
>
> In this spirit it may be remarked, that the equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small states; since they are not less solicitous to guard by every possible expedient against an improper consolidation of the states into one simple republic.

And in Number 58 Madison summarized the difference in functions between the House and Senate: "one branch of the legislature is a representation of citizens; the other of the states * * *." *Id.* at 392.

c. Other Post-Convention Materials Prior to the Ratifying Conventions.—George Mason, who did not sign the proposed Constitution, wrote on a draft of the Constitution as one of his reasons for this action that the Senate had "the power of altering all money bills, and of originating appropriations of money, and the salaries of the officers of their own appointment,

in conjunction with the President of the United States, although they are not the representatives of the people or amenable to them." II Farrand 638.

Pierce Butler, a delegate to the convention from South Carolina, wrote to Weedon Butler on October 8 describing the proposed constitution (III Farrand 102–103):

> We, in many instances took the Constitution of Britain, when in its purity, for a model, and surely We cou'd not have a better. We tried to avoid what appeared to Us the weak parts of Antient as well as Modern Republicks. * * * View the system then as resulting from a spirit of Accommodation to different Interests, and not the most perfect one that the Deputies cou'd devise for a Country better adapted for the reception of it than America is at this day, or perhaps ever will be. It is a great Extent of Territory to be under One free Government * * *. We have, as you will see, taken a portion of power from the Individual States, to form a General Government for the whole to preserve the Union. The General Government to Consist of two Branches of Legislature and an Executive to be vested in One person for four years, but elligible again—the first Branch of the Legislature to be elected by the People of the different States, agreeable to a ratio of numbers and wealth, to serve for two years. The Second to Consist of two members from each State, to be appointed by the Legislature of the States to serve for six years. * * * The powers of the General Government are so defined as not to destroy the Sovereignty of the Individual States.

In October 1787, a phamphlet was printed defending the Constitution which consisted largely of a speech written by Charles Pinckney of South Carolina which was intended to have been made to the Convention on

May 29. He attacked the weakness of the Constitution, including as one cause (III Farrand 108):

> The inequality of the principle of Representation, where the largest and most inconsiderable States have an equal vote in the affairs of the Union * * *.

Because of the many defects in the existing system, he proposed that the Convention (*ibid.*):

> * * * consider the subject de novo. That they will pay no farther attention to the Confederation, than to consider it as good materials, and view themselves as at liberty to form and recommend such a plan, as from their knowledge of the temper of the people, and the resources of the States, will be most likely to render our government firm and united. This appears to me, far more proper than to attempt the repair of a system, not only radically defective in principle, but which, if it was possible to give it operation, would prove absurd and oppressive.

Pinckney stated that (*id.* at 109–110):

> The first important alteration is, that of the principle of Representation, and the distribution of the different Powers of Government. In the federal Councils, each State ought to have a weight in proportion to its importance; and no State is justly entitled to a greater. A Representation is the sign of the reality. Upon this principle, however abused, the parliament of Great Britain is formed, and it has been universally adopted by the States in the formation of their Legislatures. * * * The abuse of this equality, has been censured as one of the most dangerous corruptions of the English Constitution; and I hope we shall not incautiously contract a disease that has been consuming them. Nothing, but necessity, could have induced Congress to ratify a Confederation upon other principles. It certainly was the opinion

> of the first Congress, in 1774, to acquire materials for forming an estimate of the comparative importance of each State; for, in the commencement of that session, they gave as a reason, for allowing each colony a vote, that it was not in their power, at that time, to procure evidence for determining their importance. This idea, of a just Representation, seems to have been conformable to the opinions of the best writers on the subject, that, in a confederated system, the members ought to contribute according to their abilities, and have a vote in proportion to their importance. But if each must have a vote, it can be defended upon no other ground, than that of each contributing an equal share of the public burdens: either would be a perfect system. The present must ever continue irreconcilable to justice. * * *
>
> The Senate, I propose to have elected by the House of Delegates, upon proportionable principles, in the manner I have stated, which, though rotative, will give that body a sufficient degree of stability and independence. The districts, into which the Union are to be divided, will be so apportioned, as to give to each its due weight, and the Senate, calculated in this, as it ought to be in every Government, to represent the wealth of the Nation.

This method of representation was based on Pinckney's view as to the proper relationship of the new national government and the States (*id.* at 112):

> I apprehend the true intention of the States in uniting, is to have a firm national Government, capable of effectually executing its acts, and dispensing its benefits and protection. In it alone can be vested those powers and prerogatives which more particularly distinguish a sovereign State. The members which compose the superintending Government are to be considered merely as parts of a great whole, and

> only suffered to retain the powers necessary to the administration of their State Systems. The idea which has been so long and falsely entertained of each being a sovereign State, must be given up; for it is absurd to suppose there can be more than one sovereignty within a Government. The States should retain nothing more than that mere local legislation, which, as districts of a general Government, they can exercise more to the benefit of their particular inhabitants * * *.

In concluding, Pinckney comments on the proposed constitution and states as one of his two objections to it the composition of the Senate. *Id.* at 127.

In a letter explaining why he had not signed the proposed constitution, Elbridge Gerry wrote that (III Farrand 128–129):

> As the convention was called for "the sole and express purpose of revising the articles of confederation, and reporting to congress, and the several legislatures, such alterations and provisions as shall render the federal constitution adequate to the exigencies of government, and the preservation of the union," I did not conceive that these powers extend to the formation of the plan proposed: but the convention being of a different opinion, I acquiesced in it, being fully convinced that to preserve the union, an efficient government was indispensably necessary; and that it would be difficult to make proper amendments to the articles of confederation.
>
> The constitution proposed has few if any federal features; but is rather a system of national government. Nevertheless, in many respects, I think it has great merit, and, by proper amendments, may be adapted to the "exigencies of government, and preservation of liberty."

Letter to the President of the Senate and Speaker of the House of Representatives of Massachusetts, October 18, 1787, III Farrand 128–129.

On October 24, 1787, Madison wrote Jefferson in detail concerning the new constitution (III Farrand 131–132):

> It was generally agreed that the objects of the Union could not be secured by any system founded on the principle of a confederation of Sovereign States. * * *
>
> Hence was embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them; and hence the change in the principle and proportion of representation.

Madison explained the relationship of the States to the federal government (*id.* at 133–134):

> The second object, the due partition of power between the General & local Governments, was perhaps of all, the most nice and difficult. A few contended for an entire abolition of the States; Some for indefinite power of Legislation in the Congress, with a negative on the laws of the States; some for such a power without a negative; some for a limited power of legislation, with such a negative; the majority finally for a limited power without the negative. * * *
>
> * * * In the American Constitution the general authority will be derived entirely from the subordinate authorities. The Senate will represent the States in their political capacity; the other House will represent the people of the States in their individual capacity.

As to the apportionment of the Senate, Madison said (*id.* at 135):

> The remaining object created more embarrassment, and a greater alarm for the issue of

> the Convention than all the rest put together. The little States insisted on retaining their equality in both branches, unless a compleat aboiition of the State Governments should take place; and made an equality in the Senate a sine qua non. The large States on the other hand urged that as the new Government was to be drawn principally from the people immediately and was to operate directly on them, not on the States; and consequently as the States wd. lose that importance which is now proportioned to the importance of their voluntary compliances with the requisitions of Congress, it was necessary that the representation in both Houses should be in proportion to their size. It ended in the compromise which you will see, but very much to the dissatisfaction of several members from the large States.

James McHenry and Luther Martin, delegates at the convention, described its proceedings to the Maryland House of Delegates on November 29. As to apportionment of the legislature, McHenry said (III Farrand 147):

> That the Representatives should be appointed according to Numbers occasioned a very long, interesting and serious Debate. The Larger States warmly contended for this Regulation and were seriously opposed by the lesser—by the latter it was contended it threw too much power into the hands of the former, and it was answered by the former that Representation ought to be according to property, or numbers, and in either case they had a right to such influence as their Situation gave them, on the contrary if each State had an equal voice, it would unreasonably throw the whole power in the lesser States—in the end a compromise took place by giving an equal Voice to each State in the Senate which 'till then the larger States had contended ought to be formed like

the other branch by a Representation according to numbers."

Martin likewise emphasized the conflict between the large and small States at the convention (III Farrand 151–153):

> * * * in forming the Confederacy the State of Virginia proposed, and obstinately contended (tho unsupported by any other)[17] for representation according to Numbers: and the second resolve now brought forward by an Honourable Member from that State was formed in the same spirit that characteriz'd its representatives in their endeavours to increase its powers and influence in the Federal Government. * * *
>
> At length the Committee of Detail brought forward their Resolutions which gave to the larger States the same inequality in the Senate that they now are proposed to have in the House of Representatives—Virginia, Pennsylvania and Massachusetts would have one half—all the Officers and even the President were to be chosen by the Legislative: so that these three States might have usurped the whole power * * *.
>
> * * * Three parties now appeared in Convention; one were for abolishing all the State Governments; another for such a Government as would give an influence to particular States—and a third party were truly Federal, and acting for general Equallity—They were for considering, reforming and amending the Federal Government, from time to time as exper'ence might point out its imperfections, 'till it could be made competent to every exigence of State, and afford at the same time ample security to Liberty and general Welfare. * * *

[16] Since McHenry was not present for this debate, his description does not come from his own observations. III Farrand 147, note 1.

[17] This statement is incorrect. See pp. 8, 9, 19, 30, 37, 44, 61 above.

> When the principles of opposition were thus formed and brought forward by the 2d. S: respecting the manner of representation, it was urged by a Member of Pennsylvania, that nothing but necessity had induced the larger States to give up in forming the Confederacy, the Equality of Representation according to numbers—That all governments flowed from the People and that their happiness being the end of governments they ought to have an equal Representation. On the contrary it was urged by the unhappy Advocates of the Jersey System that all people were equally Free, and had an equal Voice if they could meet in a general Assembly of the whole. But because one Man was stronger it afforded no reason why he might injure another, nor because ten leagued together, they should have the power to injure five; this would destroy all equality * * *. The History of all Nations and sense of Mankind shew, that in all former Confederacies every State had an equal voice. Moral History points out the necessity that each State should vote equally—In the Cantons of Switzerland those of Bene & Lucerne have more Territory than all the others, yet each State has an equal voice in the General Assembly. The Congress in forming the Confederacy adopted this rule on the principle of Natural right—Virginia then objected.

He then explained his reasons for opposing the constitution. Included among them, he said that (*id.* at 155):

> * * * a Government of *States* ought to be *Federal,* and which the object of calling Convention, and not to establish a *National Government.* It begins We the People—And the powers are made to flow from them in the first instance. That in Federal Governments an equal voice in each State is essential, as being all in a *State of Nature* with respect to each

other. Whereas the only figure in this Constitution that has any resemblance to a federal one, is the equality of Senate * * *.

An entry in Ezra Stiles' diary on December 21 has an account of the convention received from Abraham Baldwin, a delegate from Georgia. Stiles stated that the convention was (III Farrand 168–169):

> * * * pretty unanimous in the following Ideas, viz. 1. In a firm foederal Government. * * * 4. That the Jurisdictions & Govt of each State shd be left intire & preserved as inviolate as possible consistent with the coercive Subordina for preservg the Union with Firmness. 5. That the present foederal Govt was inadequate to this End. 6. That a certain Portion or Deg. of Dominion as to *Laws* and *Revenue;* as well as to Treaties with foreign Nations, War & Armies, was necessy to be ceded by individual States to the Authory of the National Council. 7. That the National Council shd consist of two Branches viz, a Senate, & Representatives. That the last shd be a local Representa apportioned to the Property & Number of Inhabitants, as far as practicable. That this shd be the governg Idea. And yet that the Distinction of States shd be preserved in the House of Representa as well as in the Senate. 8. That the Senate stand on the Election & Distinction of States as at present in Congress, and tho' like the Representa be in some measure proportioned to the No of Inhab. yet that besides this the Vote in Senate shd be by States, tho' in the House of Representa the Vote shd be by Plurality of Members present indeed but not by States as States. Hereby two things are secured, one, that the People at large shall be efficaciously represented, the other that the States as separate States be as also efficaciously represented. 9. That these two Branches combined into one Republican Body be the supreme

Legislature & become vested with the Sovereignty of the Confederacy * * *.

From December 28, 1787, to February 8, 1788, Luther Martin's "Genuine Information" was printed in the *Maryland Gazette and Baltimore Advertiser*. It consisted of an expanded version of the speech he made to the Maryland House of Delegates on November 29 (see pp. 79–80 above). Martin stated that the believers in a federal system were (III Farrand 179–186):

> * * * for taking our present *federal system* as the basis of their proceedings, and, as far as experience had shown us that there were defects, to remedy those defects; as far as experience had shown that other powers were necessary to the federal government, to give those powers. They considered this the object for which they were sent by their States, and what their States expected from them * * *.
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> * * * * *
>
> * * * Those who advocated [*inequality* of representation in the *first* branch] urged, that, when the articles of confederation were formed, it was *only* from *necessity* and *expediency* that the States were admitted *each* to have an *equal vote;* but that our situation was *now altered*, and therefore those States who considered it contrary to their interest, would *no longer abide* by it. They said, no State ought to wish to have influence in government, except in proportion to what it contributes to it; that, if it contributes but little, it ought to have but a small vote; that taxation and representation ought always to go together; that if one State had *sixteen times as many inhabitants* as *another;* or was *sixteen times as wealthy,* it ought to have *sixteen times as many votes;* that an inhabitant of Pennsylvania ought to have as much weight and consequence as an inhabitant

of Jersey or Delaware; that it was contrary to the feelings of the human mind; what the *large States* would *never* submit to; that the *large States* would have *great objects* in view, in which they would never permit the *smaller States* to thwart them; that *equality of suffrage* was the rotten part of the constitution, and that this was a happy time to get clear of it. In fine, that it was the poison which contaminated our whole system, and the source of all the evils we experienced.

This, *Sir*, is the substance of the arguments, if arguments they may be called, which were used in favor of *inequality of suffrage*. Those who advocated the *equality of suffrage*, took the matter upon the original principals of government; they urged, that all men, considered in a state of nature, before any government is formed, are equally free and independent, no one having any right or authority to exercise power over another, and this *without any regard to difference in personal strength, understanding, or wealth*. That, when such individuals enter into government, they have *each* a right to an *equal voice* in its first formation, and afterwards have *each* a right to an *equal vote* in every matter which relates to their government. That, if it could be done conveniently, they have a right to exercise it in person. Where it cannot be done in person, but for convenience representatives are appointed, to act for them, *every person* has a right to an *equal vote* in choosing that representative; who is intrusted to do for the whole, that which the whole, if they could assemble, might do in person, and in the transaction of which, each would have an equal voice. That, if we were to admit, because a man was *more wise, more strong*, or *more wealthy*, he should be entitled to *more votes* than another it would be *inconsistent with the freedom and liberty of that other*, and

would reduce him to *slavery*. Suppose, for instance, ten individuals in a state of nature, about to enter into government, *nine* of whom are *equally wise*, *equally strong*, and *equally wealthy*, the *tenth is ten times as wise*, ten times *as strong*, or ten times as *rich*; if, for this reason, he is to have *ten votes* for each *vote of either of the others*, the *nine* might as well have *no vote at all*; since, though the *whole nine* might assent to a measure, yet the vote of *the tenth* would *countervail*, and *set aside all their votes*. * * *

Having thus established these principles, with respect to the *rights of individuals* in a *state of nature*, and what is due to *each*, on entering into government, (principles established by every writer on liberty,) they proceeded to show, that *States*, when *once formed*, are considered, *with respect* to *each other*, as *individuals* in a state of nature; that, like individuals, each *State* is considered *equally free* and *equally independent*, the one having no right to exercise authority *over* the other, though more *strong*, *more wealthy*, or *abounding with more inhabitants*. That, when a number of *States* unite themselves under a *federal government*, the *same principles apply to them, as when a number of individual men* unite themselves under a *State government*. That every argument which shows *one man* ought not to have *more votes* than *another*, because he is *wiser*, *stronger*, or *wealthier*, proves that *one State* ought not to have *more votes* than *another*, because it is *stronger*, *richer*, or *more populous*. And, that by *giving one State*, or *one or two States*, *more votes* than the *others*, the *others* thereby are *enslaved to such State or States*, having the *greater number of votes*, in the *same manner* as in the case before put, of *individuals*, when one has *more votes than the others*. That the reason why each individual man in forming a State government should have an equal vote,

> is because each individual, before he enters into government, is *equally free* and *independent.* So *each State,* when *States enter* into a federal government, are entitled to an equal vote; because, before they enter into such federal government, *each State was equally free* and *equally independent.* * * *
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> * * * * *
>
> * * * That the *thirteen States* are *thirteen distinct political individual existences,* as to each other; that the *federal government* is, or *ought to be,* a government *over these thirteen political individual existences,* which form the members of that government; and that, as the *largest State,* is only a *single individual* of this government, it ought to have only *one vote;* the *smallest State,* also being *one individual member* of this government, ought also to have *one vote.*
>
> It was denied that the *equality of suffrage* was *originally* agreed to [in the confederation] on principles of *necessity* or *expediency;* on the contrary, that it was adopted on the principles of the *rights of men* and the *rights of States,* which were *then* well known, and which then influenced our conduct, although *now* they seem to be *forgotten.*

When the large States threatened that they would never agree to a system of equal representation, Martin said that the small States answered (III Farrand 186):

> That *slavery* was the *worst* that could ensue, and we considered the *system proposed* to be the *most complete, most abject* system of *slavery* that the wit of man ever devised, under the *pretence* of forming a government for free States.

He described the issue whether there should be one or two legislative bodies as a conflict between those in

favor of national and federal government (*id.* at 191–193):

> * * * those who were for *two* branches in the legislature, a House of Representatives and a Senate, urged the necessity of a *second branch*, to serve as a *check* upon the *first*, and used all those trite and common-place arguments which may be proper and just, when applied to the formation of a *State government*, over *individuals* variously distinguished in their habits and manners, fortune and rank * * *. But, on the other side, it was urged, that none of those arguments could with propriety be *applied* to the formation of a *federal government* over a number of *independent States;* that it is the *State governments* which are to watch over and protect the *rights* of the *individual*, whether *rich* or *poor*, or of *moderate circumstances*, and in which the *democratic* and *aristocratic influence* or principles are to be so *blended, modified*, and *checked*, as to prevent *oppression* and *injury;* that the federal government is to guard and protect the *States* and their *rights*, and to regulate *their common concerns;* that a *federal government* is formed by the *States*, as *States*, that is, in their *sovereign* capacities, in the same manner as *treaties* and *alliances* are formed; that *sovereignties*, considered as such, cannot be said to have jarring interests or principles, the one aristocratic, and the other democratic * * *.
>
> It was urged, that the government we were forming was not in reality a *federal*, but a *national* government; not founded on the principles of the *preservation*, but the abolition or consolidation of all *State governments;* that we appeared *totally to have forgot* the business for which we were sent, and the situation of the country for which we were preparing our system—That we had not been sent to form a

government over the *inhabitants* of America, considered as *individuals;* that as individuals, they were all subject to their respective State governments, which government would still remain, though the federal government should be dissolved * * *.

Whereas it was urged, that the principles on which a *federal* government over *States* ought to be *constructed* and *ratified,* are the *reverse;* that instead of the legislature consisting of *two* branches, *one* branch was sufficient, whether examined by the *dictates* of *reason,* or the *experience* of *ages;* that the *representation,* instead of being drawn from the *people* at large, as *individuals,* ought to be drawn from the *States as States,* in their *sovereign* capacity; that, in a *federal* government, the *parties* to the compact are not the *people,* as *individuals,* but the States, as States; and that it is by the *States* as States, in their *sovereign* capacity, that the system of government ought to be *ratified;* and not by the *people, as individuals.*

It was further said, that, in a *federal* government over States *equally* free, sovereign, and independent, *every State* ought to have an equal share in *making* the *federal laws* or *regulations,* in deciding upon them, and in *carrying them into execution; neither* of which was the case in this system, but the *reverse;* the States not having an *equal voice* in the *legislature,* nor in the *appointment* of the *executive,* the *judges,* and the *other officers of government.* It was insisted, that, in the *whole* system, there was but *one federal* feature,—the appointment of the senators by the States in their sovereign capacity, that is, by their legislatures, and the equality of suffrage in that branch; but it was said, that *this feature* was only *federal* in *appearance.*

Martin strongly emphasized that the proposed convention created a national, not a federal, government (*id.* at 195):

> Nay, so far were the friends of the system from pretending that they meant it, or considered it as a *federal* system, that on the question being proposed, "that a union of the States, merely federal, ought to be the sole object of the exercise of the powers vested in the convention," it was negatived by a majority of the members, and it was resolved "that a national government ought to be formed." Afterwards the word *"national"* was struck out by them, because they thought the *word* might tend to *alarm;* and although, *now,* they who *advocate* the system pretend to call themselves *federalists,* in convention the distinction was quite the reverse; those who *opposed* the system were *there* considered and styled the *federal party,* those who advocated it, the *antifederal.*

Robert Yates and John Lansing, both delegates to the convention from New York, reported to the governor their opposition to the constitution because it was a "consolidation of the United States into one government." III Farrand 245. They explained (*id.* at 245–246):

> Nor could we suppose, that if it had been the intention of the legislature, to abrogate the existing confederation, they would, in such pointed terms, have directed the attention of their delegates to the revision and amendment of it, in total exclusion of every other idea.
>
> Reasoning in this manner, we were of opinion, that the leading feature of every amendment, ought to be the preservation of the individual states, in their uncontrouled constitutional rights * * *.

Luther Martin explained in the *Maryland Journal* of March 18th his ideas on the marked distinction

between the state and federal governments (III Farrand 284):

> In a state government, I consider all power flowing immediately from the people in their individual capacity, and that the people, in their individual capacity, have, and ought to have the right of choosing delegates in a state legislature, the business of which is to make laws, regulating their concerns, as individuals, and operating upon them as such; but in a federal government, formed over free states, the power flows from the people, and the right of choosing delegates belongs to them only mediately through their respective state governments which are the members composing the federal government, and from whom all its power immediately proceeds; to which state governments, the choice of the federal delegates immediately belongs.

In May 1788, John Dickinson, in one of his Letters of Fabius, defended the equal representation of the States in the Senate (III Farrand 304):

> There is another improvement equally deserving regard, and that is, the varied representation of sovereignties and people in the constitution now proposed.
>
> It has been said, that this representation was a mere compromise.
>
> It was not a mere compromise. *The equal representation of each state in one branch of the legislature,* was an original substantive proposition, made in convention, very soon after the draft offered by Virginia, to which last mentioned state United America is much indebted not only in other respects, but for her merit in the origination and prosecution of this momentous business.
>
> The proposition was expressly made upon this principle, that a territory of such extent as that of United America, could not be safely

> and advantageously governed, but a combination of republics, each retaining all the rights of supreme sovereignty, excepting such as ought to be contributed to the union; that for the securer preservation of these sovereignties, they ought to be represented in a body by themselves, and with equal suffrage; and that they would be annihilated, if both branches of the legislature were to be formed of representatives of the people, in proportion to the number of inhabitants in each state.

d. The Ratifying Conventions.—In the Massachusetts convention, various delegates emphasized the sharp distinction between the function of the Senate and the House of Representatives. Fisher Ames, later a Congressman, stated that (II *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Elliot editor, 2d ed., 1854),[18] p. 11):

> The senators will represent the sovereignty of the states. The representatives are to represent the people.

Christopher Gore similarly remarked (*id.* at 18):

> The Senate represents the sovereignty of the states; the House of Representatives the people of the United States.

And E. Pierce said (*id.* at 22):

> [T]he federal representatives, who are to form the democratical part of the general government, are to be a check on the representatives of the sovereignty, the senate * * *.

In the debate on the constitution of the Senate, Fisher Ames defended the provision that Senators serve for six years (II Elliot 46):

> The *senators* represent the *sovereignty of the states;* in the other house, individuals are rep-

[18] Hereinafter referred to as "Elliot."

> resented. * * * [Senators] are in the quality of ambassadors of the states * * *. If they would be brought by that means more immediately under the influence of the people, then they will represent the state legislatures less, and become the representatives of individuals. This belongs to the other house. The absurdity of this, and its repugnancy to the federal principles of the Constitution, will appear more fully, by supposing that they are to be chosen by the people at large. If there is any force to the objection to this article, this would be proper. But whom in that case, would they represent?—Not the legislatures of the states, but the people. This would totally obliterate the federal features of the Constitution.

Continuing this debate, Rufus King, a delegate to the Congress under the Confederation and to the federal convention, noted (*id.* at 47):

> [A]s the Senate preserved the equality of the states, their apportionment is equal.

In the debate on Article I, Section 4, which gives Congress power to regulate federal elections, George Cabot, later a United States Senator, stated (II Elliot 25–26):

> [*A*] *free and equal representation is the best, if not the only foundation upon which a free government can be built;* and, consequently, that the greatest care should be taken in laying it. * * * I consider the *democratic* branch of the national government, the branch chosen immediately for the people, as intended to be a *check* on the *federal* branch, which latter is not an immediate representation of the people of America, and is not chosen by them, but is a representation of the sovereignty of the individual states, and its members delegated by the several state legislatures * * *. [Emphasis in original.]

Immediately thereafter Theophilus Parsons, a leading attorney, said (*id.* at 26–27):

> In the Congress, not only the sovereignty of the states is represented in the Senate, but, to balance their power, and to give the people a suitable and efficient check upon them, the federal representatives are introduced into Congress. The legislatures of the several states are the constituents of the Senate, and the people are the constituents of the Representatives * * *. [A state legislature] might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially and preserve and restore to the people their equal and sacred rights of election.

Continuing the debate on this provision, Dr. Charles Jarvis argued (*id.* at 29):

> The right of election, founded on the principle of equality, was, he said, the basis on which the whole superstructure was erected; this right was inherent in the people; it was unalienable in its nature, and it could not be destroyed without presuming a power to subvert the Constitution, of which this was the principal; and by recurring to the 2d section, it would appear that "*representatives and direct taxes shall be apportioned among the several states according to their respective numbers;*" it equally appeared that 30,000 inhabitants were entitled to send a representative, and that wherever this number

> was found, they would have a right to be represented in the federal legislature.[19]

Judge Francis Dana, who was a member of the Congress under the Confederation and who was chosen to attend the federal convention but was unable to do so, also defended Article I, Section 4 (II Elliot 49):

> The legislature of Rhode Island has lately formed a plan to alter their representation to corporations, which ought to be by numbers. Look at Great Britain, where the injustice of this mode is apparent. Eight tenths of the people there have no voice in the elections. A borough of but two or three cottages has a right to send two representatives to *Parliament*, while Birmingham, a large and populous manufacturing town, lately sprung up, cannot send one. The legislature of Rhode Island are about adopting this plan, in order to deprive the towns of Newport and Providence of their weight, and that thereby the legislature may have a power to counteract the will of a majority of the people.

Rufus King immediately agreed with Dana in support of Article I, Section 4 (*id.* at 50–51):

> In Connecticut, they do not choose by numbers, but by corporations. Hartford, one of their largest towns, sends no more delegates than one of their smallest corporations, each town sending two, except latterly, when a town was divided. The same rule is about to be adopted in Rhode Island. The inequality of such representation, where every corporation

[19] Delegates Holmes and Widgery pointed out that the Constitution did not provide for a representative for every 30,000 people but a maximum of one representative for every 30,000 people. II Elliot 30, 32.

> would have an equal right to send an equal number of representatives, was apparent. In the Southern States, the inequality is greater. By the constitution of South Carolina, the city of Charleston has a right to send thirty representatives to the General Assembly; the whole number of which amounts to two hundred. The back parts of Carolina have increased greatly since the adoption of their constitution, and have frequently attempted an alteration of this unequal mode of representation; but the members from Charleston, having the balance so much in their favor, will not consent to an alteration; and we see that the delegates from Carolina in Congress have always been chosen by the delegates of that city. The representatives, therefore, from that state will not be chosen *by the people*, but will be the representatives of a faction of that state.

Later in the debate, two speakers emphasized that most American legislatures were apportioned on the basis of population. John Coffin Jones said (II Elliot 75):

> [T]he people of the United States are an enlightened, well-informed people, and are, therefore, not easily imposed on by designing men. Our right of representation, concluded Mr. J., is much more just and equitable than the boasted are of Great Britain, whose representatives are chosen by corporations or boroughs * * *.

Similarly, James Bowdoin, a member of the Congress under the Confederation and former governor, remarked that (*id.* at 127):

> The equality of representation is determined in nearly all the states by numbers; so it is in the federal Constitution.

In the Connecticut convention, Oliver Wolcott a delegate to the Continental Congress and later governor, defended the proposed constitution. In doing so, he said (II Elliot 202):

> The Senate, a constituent branch of the general legislature, without whose assent no public act can be made, are appointed by the states, and will secure the rights of the several states. The other branch of the legislature, the Representatives, are to be elected by the people at large. They will therefore be the guardians of the rights of the great body of the citizens.

Similarly, during the New York convention, Melancton Smith, a delegate to the Continental Congress, said (II Elliot 311):

> [A]s the senators are the representatives of the *state legislatures*, it is reasonable and proper that they should be under their control.

Alexander Hamilton described the conflict over representation in Congress (*id.* at 236):

> On the other hand, the small states, seeing themselves embraced by the Confederation upon equal terms, wished to retain the advantages which they already possessed. The large states, on the contrary, thought it improper that Rhode Island and Delaware should enjoy an equal suffrage with themselves. From these sources a delicate and difficult contest arose. It became necessary, therefore, to compromise, or the Convention must have dissolved without effecting any thing.

Robert Lansing likewise said (*id.* at 272):

> When the subject of the apportionment of representatives came forward, the large states insisted that the equality of suffrage should be

> abolished. This the small states opposed contending that it would reduce them to a state of subordination. There was such a division that a dissolution of the Convention appeared unavoidable, unless some conciliatory measure was adopted.

Later in the convention, Lansing described the nature of the Senate (*id.* at 289):

> I believe it was undoubtedly the intention of the framers of this Constitution to make the lower house the proper, peculiar representative of the interests of the people; the Senate, of the sovereignty of the states.

Patrick Henry, the great orator of the Revolution and former governor, was one of the leading opponents of the Constitution at the Virginia convention. One of his principal objections to the Constitution involved representation in Congress (III Elliot 46–47):

> [The Constitution] says that there shall not be more representatives than one for every thirty thousand. Now, sir, how easy is it to evade this privilege! "The number shall not exceed one for every thirty thousand." This may be satisfied by one representative from each state. Let our numbers be ever so great, this immense continent may, by this artful expression, be reduced to have but thirteen representatives * * *. When population increases, and a state shall send representatives in this proportion, Congress *may* remand them, because the right of having one for every thirty thousand is not clearly expressed. * * * [W]e may fairly conclude that they *may* restrain the number to one from each state. Perhaps the same horrors may hang over my mind again.

Later in the debate, he similarly contended (*id.* at 324):

> The honorable gentleman was pleased to say that the representation of the people was the vital principle of this government. I will readily agree that it ought to be so. But I contend that this principle is only nominally, and not substantially, to be found there. We contended with the British about representation. They offered us such a representation as Congress now does. They called it a virtual representation. If you look at that paper, you will find it so there. Is there but a virtual representation in the upper house? The states are represented, as *states*, by two senators each. This is virtual, not actual. They encounter you with Rhode Island and Delaware. This is not an actual representation. What does the term *representation* signify? It means that a certain district—a certain association of men—should be represented in the government, for certain ends. These ends ought not to be impeded or obstructed in any manner. Here, sir, this populous state has not an adequate share of legislative influence. The two petty states of Rhode Island and Delaware, which, together are infinitely inferior to this state in extent and population, have double her weight, and can counteract her interest. I say that the representation in the Senate, as applicable to states, is not actual. Representation is not, therefore, the vital principle of this government. So far it is wrong.

Another opponent of the Constitution, William Grayson, a former member of the Continental Congress and later to be a United States Senator, similarly argued (III Elliot 280):

> A democratic branch marked with the strong features of aristocracy, and an aristocratic

> branch with all the impurities and imperfections of the British House of Commons, arising from the inequality of representation and want of responsibility. There will be plenty of Old Sarums [a rotten borough], if the new Constitution should be adopted. Do we love the British so well as to imitate their imperfections? We could not effect it more than in that particular instance. Are not all defects and corruptions founded on an inequality of representation and want of responsibility?

A few moments later, Grayson said (*id.* at 281):

> But the British House of Commons are corrupted from the same cause that our representatives will be: I mean *from the Old Sarums* among them—from the inequality of the representation.

Grayson objected to the power of the Senate to propose amendments to "money bills." He said that in the lower house (*id.* at 376):

> * * * the people are represented according to their numbers. In the upper house, the states are represented in their political capacities. Delaware or Rhode-Island has as many representatives here as Massachusetts. Why should the senate have a right to intermeddle with money, when the representation is neither equal or just?

In defending the need for Congressional control over federal elections provided in Article I, Section 4, James Madison said (III Elliot 367):

> Elections are regulated now unequally in some states, particularly South Carolina, with respect to Charleston, which is represented by thirty members.

William Richardson Davie, a delegate to the national convention, described its proceedings to the

North Carolina ratifying convention. As to Congress, he stated (IV Elliot 21):

> The House of Representatives are immediately elected by the people. The senators represent the sovereignty of the states; they are directly chosen by the state legislatures, and no legislative act can be done without their concurrence.

Concerning the nature of the new federal system, Davie said (*id.* at 22–23):

> Every member saw that the existing system would ever be ineffectual, unless its laws operated on individuals, as military coercion was neither eligible nor practicable. Their own experience was fortified by their knowledge of the inherent weakness of all confederate governments. They knew that all governments merely federal had been short-lived, or had existed from principles extraneous from their constitutions, or from external causes which had no dependence on the nature of their governments. These considerations determined the Convention to depart from that solecism in politics—the principle of legislation for states in their political capacities.
>
> The great extent of country appeared to some a formidable difficulty; but a confederate government appears, at least in theory, capable of embracing the various interests of the most extensive territory. Founded on the state governments solely, as I have said before, it would be tottering and inefficient. It became, therefore, necessary to bottom it on the people themselves, by giving them an immediate interest and agency in the government. * * *
>
> The business of the Convention was to amend the Confederation by giving it additional powers. The present form of Congress, being a single body, it was thought unsafe to augment its powers, without altering its organization.

James Iredell, one of the initial members of this Court, was one of the leading supporters of the proposed constitution at the North Carolina convention. In doing so, he defended the balance of the new federal system (IV Elliot 38–39):

> Thus, then, the general government is to be taken care of, and the state governments to be preserved. The former is done by a numerous representation of the people of each state, in proportion of its importance. The latter is effected by giving each state an equal representation in the Senate. The people will be represented in one house, the state legislatures in the other * * *. The House of Representatives * * * will represent the immediate interests of the people. * * * The respectability of their constituents, who are the free citizens of America, will add great weight to the representatives * * *.

Subsequently, he similarly remarked (*id.* at 133):

> It is true that it would be very improper if the Senate had authority to prevent the House of Representatives from protecting the people. It would be equally so if the House of Representatives were able to prevent the Senate from protecting the sovereignty of the states.

Richard Dobbs Spaight, a delegate at the federal convention, explained the reason that the Senate was required to concur in treaties (IV Elliot 27):

> [i]t was thought better to put that power into the hands of the senators as representatives of the states—that thereby the interest of every state was equally attended to in the formation of treaties—but that it was not considered as a legislative act at all.

Davie likewise defended this requirement, saying that it was (*id.* at 120):

> * * * indispensable to give to the senators, as representatives of states, the power of making, or rather ratifying, treaties. Although it militates against every idea of just proportion that the little state of Rhode Island should have the same suffrage with Virginia, or the great commonwealth of Massachusetts, yet the small states would not consent to confederate without an equal voice in the formation of treaties.

In defending Article I, Section 4, which gives Congress power to regulate federal elections, Davie remarked that (IV Elliot 58):

> * * * a consolidation of the states is said by some gentlemen to have been intended. They insinuate that this was the cause of their giving this power of elections. If there were any seeds in this Constitution which might, one day, produce a consolidation, it would, sir, with me, be an insuperable objection, I am so perfectly convinced that so extensive a country as this can never be managed by one consolidated government. The Federal Convention were as well convinced as the members of this house, that the state governments were absolutely necessary to the existence of the federal government. They considered them as the great massy pillars on which this political fabric was to be extended and supported; and were fully persuaded that, when they were removed, or should moulder down by time, the general government must tumble into ruin. A very little reflection will show that no department of it can exist without the state governments.

John Steele, later a Congressman, also defended Article I, Section 4 against the charge that it would

allow Congress to pass laws ensuring the election of persons on the seacoast (*id.* at 71):

> They [Congress] may, and most probably will, lay the state off into districts. * * * If the Congress makes laws inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them.

Charles Pinckney, a delegate at Philadelphia, described the proceedings in the South Carolina Convention. Concerning the question of representation, he said that (IV Elliot 256–257):

> The degree of weight which each state was to have in the federal council became a question of much agitation. The larger states contended that no government could long exist whose principles were founded in injustice; that one of the most serious and unanswerable objections to the present system was the injustice of its tendency in allowing each state an equal vote, notwithstanding their striking disparity. The small ones replied, and perhaps with reason, that, as the states were the pillars upon which the general government must ever rest, their state governments must remain; that, however they may vary in point of territory or population, as political associations they were equal; that upon these terms they formally confederated, and that no inducement whatsoever should tempt them to unite upon others * * *.
>
> After much anxious discussion,—for, had the Convention separated without determining upon a plan, it would have been on this point,—a compromise was effected, by which it was determined that the first branch be so chosen as to represent in due proportion the people of the Union; that the Senate should be the representatives of the states, where each should have an equal weight.

Charles Cotesworth Pinckney, another delegate to the federal convention, likewise stated (*id.* at 282–283):

> As we have found it necessary to give very extensive powers to the federal government both over the persons and estates of the citizens, we thought it right to draw one branch of the legislature immediately from the people, and that both wealth and numbers should be considered in the representation.

Pinckney supported the provisions concerning Congress (*id.* at 304):

> [I]n the general Constitution, the House of Representatives will be elected immediately by the people, and represent them and their personal rights individually; the Senate will be elected by the state legislatures, and represent the states in their political capacity * * *.

James Wilson, on November 24, 1787, wrote a letter explaining the constitution to the Pennsylvania ratifying convention. As to the basic nature of the new government, he stated (III Farrand 140):

> At this period, America has it in her power to adopt either of the following modes of government: She may dissolve the individual sovereignty of the States, and become one consolidated empire; she may be divided into thirteen separate, independent and unconnected commonwealths; she may be erected into two or more confederacies; or, lastly, she may become one comprehensive Federal Republic. * * *
>
> Of [the first] three species of government, however, I must observe, that they obtained no advocates in the Federal Convention, nor can I presume that they will find advocates here, or in any of our sister States. The general sentiment in that body, and, I believe, the general

> sentiment of the citizens of America, is expressed in the motto which some of them have chosen, UNITE OR DIE; and while we consider the extent of the country, so intersected and almost surrounded with navigable rivers, so separated and detached from the rest of the world, it is natural to presume that Providence has designed us for an united people, under one great political compact. If this is a just and reasonable conclusion, supported by the wishes of the people, the Convention did right in proposing a single confederated Republic.

In the ratifying convention itself, Wilson, one of the leading exponents of apportionment based on population in both houses, said (III Farrand 144):

> The truth is, Sir, that the framers of this system were particularly anxious, and their work demonstrates their anxiety, to preserve the state governments unimpaired—it was their favorite object; and, perhaps, however proper it might be in itself, it is more difficult to defend the plan on account of the excessive caution used in that respect than from any other objection that has been offered here or elsewhere. * * * I trust it is unnecessary to dwell longer upon this subject; for, when gentlemen assert that it was the intention of the federal convention to destroy the sovereignty of the states, they must conceive themselves better qualified to judge of the intentions of that body than its own members, of whom not one, I believe, entertained so improper an idea.

Later, Wilson similarly stated (*id.* at 162):

> I say, Sir, that it was the design of this system, to take some power from the State government, and to place it in the general government. It was also the design, that the people should be admitted to the exercise of some powers which they did not exercise under

> the present confederation. It was thought proper that the citizens, as well as the States, should be represented * * *.

e. Materials on the Constitution Originating after the Start of the New Government.—In 1796, President Washington's Message to the House of Representatives explained why it was not necessary under the Constitution to submit Jay's treaty with Great Britain to the House (III Farrand 371):

> It is a fact, declared by the General Convention, and universally understood, that the Constitution of the United States was the result of a spirit of amity and mutual concession. And it is well known that, under this influence, the smaller States were admitted to an equal representation in the Senate, with the larger States; and that this branch of the Government was invested with great powers; for, on the equal participation of those powers, the sovereignty and political safety of the smaller States were deemed essentially to depend.

Jonathan Dayton, a delegate from New Jersey at the constitutional convention, described the compromise between the large and small States in the Senate in 1803 (III Farrand 400–403):

> Mr. Dayton believed it would come to this, that when the question came to be discussed, and the rights of the small States maintained, the large States would threaten us with their power. The same threats had been heard in the old Congress, but they were laughed at, for the votes of the States were equal; they were heard in the Convention, but they were spurned at, for the votes were equal there also; the large States must be cautious here, for in this body, too, the votes are equal. * * * The States, whatever was their relative magnitude, were equal under the old Confederation, and the

small States gave up a part of their rights as a compromise for a better form of government and security; but they cautiously preserved their equal rights in the Senate and in the choice of a Chief Magistrate.

* * * * * *

* * * But a few years ago we were equal in votes and influence, though inferior in size and population, to the largest States. We consented to give up a certain portion of that influence for the general good, expressly retaining the other portion for our own protection and security. This instrument, the Constitution, which we have sworn to support, and are now about to deface, is the new compact which that temper produced. It is the great plan of compromise between the jarring and contending interests of the great and small States.

In a letter written in 1803, Gouverneur Morris also described the compromise (III Farrand 404–405):

That if, in the new legislature, as in the old Congress, each had been equally represented, and each preserved an equal vote, the sacrifice or rights would have been equal. But when it was admitted, that, in the National Legislature, the Representatives should be appointed according to the number of citizens, the sacrifice of rights was great, in proportion as the States were small. Thus Delaware, which had but one Representative out of sixty-five, retained only one sixty-fifth part of the nation's authority; and Virginia, which had ten Representatives, obtained two thirteenths. Wherefore, since each had previously enjoyed one thirteenth, Delaware lost four fifths of its power, and that of Virginia was doubled, so that Delaware, compared to Virginia, was reduced under the new establishment from equality to one tenth. It

> was moreover evident, that the course of population would daily increase this decided superiority of the great States. That, of course, if the whole power of the union had been *expressly* vested in the House of Representatives, the smaller States would never have adopted the Constitution. But in the Senate they retained an equal representation, and to the Senate was given a considerable share of those powers exercised by the old Congress.

In 1818 Charles Pinckney, a delegate to the federal convention, wrote to John Quincy Adams concerning the proceedings of the convention. He said (III Farrand 427):

> My Plan was substantially adopted in the sequel except as to the Senate & giving more power to the Executive than I intended—the force of Vote which the small & middling states had in the Convention prevented our obtaining a proportional representation in more than one branch * * *.

A little over a year later, Pinckney stated in the Senate (*id.* at 441–442):

> On a motion from Virginia the Convention met at Philadelphia, where, as you will find from the Journals, we were repeatedly in danger of dissolving without doing any thing; that body being equally divided as to large and small States, and each having a vote, and the small States insisting most pertinaciously, for near six weeks, on equal power in both branches—nothing but the prudence and forbearance of the large States saved the Union. A compromise was made, that the small States and large should be equally represented in the Senate, and proportionally in the House of Representatives. * * *
>
> * * * [The small States] did, by force, or something like it, deprive us of a rightful part of our representation * * *.

In 1824, Rufus King wrote a letter explaining the Constitution's provisions concerning the election of President (III Farrand 462–463):

> The election of the Pr., as it is one of the most important, so it is one of the most intricate provisions of the Constitution, and in its object, except in the first stage of the process, is assigned to the States acting in their federal equal capacity. For this reason, measures which may be employed in the several States, under regulations and provisions of simple, and single sovereignties, could not be adopted in the balanced system of the Constitution of the U.S.—a compact between the States, wh. contains special provisions whereby the executive, legislative and judicial officers must be appointed.

In discussing the same subject, James Madison similarly wrote in 1825 (*id.* at 464):

> In our complex system of polity, the public will, as a source of authority, may be the will of the people as composing one nation; or the will of the States in their distinct and independent capacities; or the federal will, as viewed, for example, through the Presidential electors, representing, in a certain proportion, both the nation and the States.

In 1825 William Steele wrote a letter describing the account of the conflict over representation in the convention which he had received from Jonathan Dayton, who had been a delegate (III Farrand 468–469):

> When the details of the House of Representatives were disposed of, a more knotty point presented itself in the organization of the Senate. The larger states contended that the same *ratio*, as to states, should be common to both

branches of the legislature; or, in other words, that each state should be entitled to a representation in the Senate, (whatever might be the number fixed on,) in proportion to its population, as in the House of Representatives. The smaller states, on the other hand, contended that the House of Representatives might be considered as the guardian of the liberties of the *people,* and therefore ought to bear a just proportion to *their* numbers; but that the Senate represented the *sovereignty of the States,* and that as each state, whether great or small, was equally an independent and sovereign state, it ought, in this branch of the legislature, to have *equal* weight and authority; without this, they said, there could be no security for their equal rights—and they would, by such a distribution of power, be merged and lost in the larger states.

* * * * *

When the Convention had adjourned over to the next day, the delegates of the four smallest states, i.e., Rhode Island, Connecticut, New Jersey, and Delaware, convened to consult what course was to be pursued in the important crisis at which we had arrived. After serious investigation, it was solemnly determined to ask for a *reconsideration* the next morning; and if it was not granted, or if, when granted, that offensive feature of the Constitution could not be expunged, and the smaller states put upon an *equal footing* with the largest, we would secede from the Convention, and, returning to our constituents, inform them that no compact could be formed with the large states, but one which would sacrifice our sovereignty and independence.

In 1826, Madison wrote Andrew Stevenson concerning the confusion between national and federal gov-

ernment as applied to proposals before the constitutional convention (III Farrand 473–474):

> Will you pardon me for pointing out an error of fact into which you have fallen, as others have done, by supposing that the term, *national* applied to the contemplated Government, in the early stage of the Convention, particularly in the propositions of Mr. Randolph, was equivalent to *unlimited* or consolidated. This was not the case. The term was used, not in contradistinction to a limited, but to a *federal* Government. As the latter operated within the extent of its authority thro' requisitions on the confederated States, and rested on the sanction of State Legislatures, the Government to take its place, was to operate within the extent of its powers directly & coercively on individuals, and to receive the higher sanction of the people of the States. And there being no technical or appropriate denomination applicable to the new and unique System, the term national was used, with a confidence that it would not be taken in a wrong sense, especially as a right one could be readily suggested if not sufficiently implied by some of the propositions themselves. Certain it is that not more than two or three members of the Body and they rather theoretically than practically, were in favor of an unlimited Govt. founded on a consolidation of the States; and that neither Mr. Randolph, nor any one of his colleagues was of the number.

Madison similarly wrote N. P. Trist in 1831 (*id.* at 517–518):

> On recurring to the writings of Col. Taylor, it will be seen that he founds his imputation agst. myself and Govr. Randolph, of favoring a Consolidated National Governt on the Resolutions introduced into the Convention by the latter, in behalf of the Virga. Delegates, from

a consultation among whom they were the result. The Resolutions imported that a Govt. consisting of a *National* Legislre. Executive & Judiciary, ought to be substituted for the Existing Congs. Assuming for the term *National* a meaning coextensive with a Single Consolidated Govt. he filled a number of pages, in deriving from that source, a support of his imputation. The whole course of proceedings on those Resolutions ought to have satisfied him that the term *National* as contradistinguished from *Federal*, was not meant to express more than that the powers to be vested in the new Govt. were to operate as in a Natl. Govt. directly on the people, & not as in the Old Confedcy. on the States only * * *.

It ought to have occurred that the Govt. of the U.S. being a novelty & a compound, had no technical terms or phrases appropriate to it; and that old terms were to be used in new senses, explained by the context or by the facts of the case.

Some exulting inferences have been drawn from the change noted in the Journal of the Convention, of the word *National* into *"United States."* The change may be accounted for by a desire to avoid a misconception of the former, the latter being preferred as a familiar caption. That the change could have no effect on the real character of the Govt. was & is obvious; this being necessarily deduced from the actual structure of the Govt. and the quantum of its powers.

In 1833, Madison again denied that he had desired at the constitutional convention to form a consolidated government in which the States were the equivalent of provinces (III Farrand 529–530):

The Charge must rest on the term "National" prefixed to the organized Depts. in the

propositions of Mr. R. yet how easy is it to acct. for the use of the term witht taking it in a consolidating sense?

In the 1st. place. It contradistinguished the proposed Govt from the Confederacy which it was to supersede.

2. As the System was to be a new & compound one a nondescript without a technical appellation for it, the term "National" was very naturally suggested by its national features. 1. in being estabd. not by the authority of State Legs but by the original authy. of the people 2. in its organization into Legisl. Ex. & Judy. Departs.: and 3. in its action on the people of the States immediately, and not on the Govts. of the States, as in a Confederacy.

But what alone would justify & acct. for the application of the term National to the proposed Govt. is that it wd. possess, exclusively all the attributes of a natl. Govt. in its relations with other nations including the most essential one, of regulating foreign Commerce; with an effective means of fulfilling the obligs. & responsiby of the U.S. to other nations. Hence it was that the term natl. was at once so readily applied to the new Govt. and that it has become so universal & familiar.

In March 1836, Madison described the conflict over apportionment at the convention (III Farrand 538):

It is well known that the equality of the States in the Federal Senate was a compromise between the larger and the smaller States, the former claiming a proportional representation in both branches of the Legislature, as due to their superior population; the latter an equality in both, as a safeguard to the reserved sovereignty of the States, an object which obtained the concurrence of members from the larger States. But it is equally true, though but little reverted to as an instance of miscalculating

> speculation, that, as soon as the smaller States had secured more than a proportional share in the proposed Government, they became favourable to augmentations of its powers, and that, under the administration of the Government, they have generally, in contests between it and the State governments, leaned to the former.

Subsequently, Madison wrote a description of the constitutional convention in a preface to his notes on the convention (III Farrand 539):

> As the weakness and wants of man naturally lead to an association of individuals, under a common authority, whereby each may have the protection of the whole against danger from without, and enjoy in safety within, the advantages of social intercourse, and an exchange of the necessaries & comforts of life: in like manner feeble communities, independent of each other, have resorted to a Union, less intimate, but with common Councils, for the common safety agst. powerful neighbors, and for the preservation of justice and peace among themselves. Ancient history furnishes examples of these confederacies, tho' with a very imperfect account, of their structure, and of the attributes and functions of the presiding Authority. There are examples of modern date also, some of them still existing, the modifications and transactions of which are sufficiently known.
>
> It remained for the British Colonies, now United States, of North America, to add to those examples, one of a more interesting character than any of them: which led to a system without a precedent ancient or modern, a system founded on popular rights, and so combing. a federal form with the forms of individual Republics, as may enable each to supply the defects of the other and obtain the advantages of both—

2. THE VIEWS OF THOMAS JEFFERSON AND JAMES MADISON ON APPORTIONING STATE LEGISLATURES

a. Thomas Jefferson.—In June 1776, Jefferson wrote a Proposed Constitution for Virginia. It provided as to apportionment of the legislature (II Writings of Thomas Jefferson (Ford ed., 1893), p. 15):

> The number of representatives for each county or borough shall be so proportioned to the number of it's qualified electors that the whole number of representatives shall not exceed [300] nor be less than [150.] for the present there shall be one representative for every [400] qualified electors in each county or borough * * *.

The Senate was to be elected by the House of Delegates apparently from the State at large without regard to residence.

Jefferson's Notes on Virginia, which was written in 1781, discussed the then existing constitution of the State (III *id.* at 222):

> This constitution was formed when we were new and unexperienced in the science of government. It was the first, too, which was formed in the whole United States. No wonder then that time and trial have discovered capital defects in it.

Included in the defects which Jefferson found was (III *id.* at 222–223):

> 2. Among those who share the representation, the shares are very unequal. Thus the county of Warwick, with only one hundred fighting men, has an equal representation with the county of Loudon, which has 1746. So that every man in Warwick has as much influence in the government as 17 men in Loudon. * * *

> * * * It will appear at once that nineteen thousand men, living below the falls of the rivers, possess half of the senate, and want four members only of possessing a majority of the house of delegates * * *. These nineteen thousand, therefore, living in one part of the country, give law to upwards of thirty thousand living in another * * *.

In June 1783, Jefferson wrote another proposed constitution for Virginia. It provided as to the legislature that (III *id.* at 322–323):

> The number of delegates which each county may send shall be in proportion to the number of its qualified electors * * *.
>
> * * * If any county be reduced in its qualified electors below the number authorized to send one delegate, let it be annexed to some adjoining county.

Since the Senate was to have one senator for every 6 delegates in districts to be formed, it was likewise apportioned according to population.

A letter to Archibald Stuart, a life-long friend of Jefferson's and a member of the Virginia legislature, which was written on December 23, 1791, again stated Jefferson's ideas on changing the Virginia Constitution. He started his list of proposals (V *id.* at 410):

> I consider the following changes as important. Render the legislature a desirable station by lessening the number of representatives (say to 100) and lengthening somewhat their term, and proportion them equally among the electors * * *.

Later, in approximately 1794, Jefferson wrote Notes for a Constitution. He stated that (VI *id.* at 520):

> The legislature shall provide that returns be made to themselves periodically of the qualified voters in every county, by their name and quali-

> fication and from the whole number of qualified voters in the commonwealth such an Unit of representation shall from time to time be taken as will keep the number of representatives within the limits of 150 and 300 allowing to every county a representative for every Unit & fraction of more than half a Unit it contains.

Jefferson wrote in the margin that "[i]f a county has not an half Unit, add its votes to another." *Ibid.*

In 1816, a constitutional convention for Virginia was being considered. In a letter to Samuel Kercheval on July 12, Jefferson discussed his ideas on the subject in detail, although he made clear that they were not for publication. A considerable proportion of the letter was devoted to representation in the legislature (X *id.* at 37–41):

> At the birth of our republic * * * the abuses of monarchy had so much filled all the space of political contemplation, that we imagined everything republican which was not monarchy. We had not penetrated to the mother principle, that "governments are republican only in proportion as they embody the will of their people, and execute it." Hence, our first constitutions had really no leading principles in them. But experience and reflection have but more and more confirmed me in the particular importance of the equal representation then proposed.
>
> * * * * *
>
> But inequality of representation in both Houses of our legislature, is not the only republican heresy in this first essay of our revolutionary patriots at forming a constitution. For let it be agreed that a government is republican in proportion as every member composing it has his equal voice in the direction

> of its concerns (not indeed in person, which would be impracticable beyond the limits of a city, or small township, but) by representatives chosen by himself, and responsible to him at short periods, and let us bring to the test of this canon every branch of our constitution.
>
> In the legislature, the House of Representatives is chosen by less than half the people, and not at all in proportion to those who do choose. The Senate are still more disproportionate.
>
> * * * * *
>
> The true foundation of republican government is the equal right of every citizen, in his person and property, and in their management.
>
> * * * * *
>
> The sum of these amendments is, 1. General Sufferage. 2. Equal representation in the legislature.

On November 19, 1819, Jefferson wrote William King (Jefferson Papers, Library of Congress, vol. 216, p. 38616):

> Equal representation is so fundamental a principle in a true republic that no prejudice can justify its violation because the prejudices themselves cannot be justified.

b. James Madison.—On August 23, 1785, Madison wrote John Brown, a friend and later a leader in Kentucky's quest for statehood and a Congressman and Senator, concerning legislative apportionment (I Letters and Other Writings of James Madison (1865), pp. 181–182):

> [P]roportioning of the representatives * * * may easily be done, in the first instance, either by comprising within each County an equal number of Electors, or by proportioning the number of representatives of each County to its number of Electors. The difficulty arises from

the disproportionate increase of electors in different Counties. There seem to be two methods only by which the representation can be equalized from time to time. The first is to change the bounds of the Counties; the second, to change the number of representatives allotted to them, respectively. As the former would not only be most troublesome and expensive, but would involve a variety of other adjustments, the latter method is evidently the best. Examples of a Constitutional provision for it exists in several of the States. In some it is to be executed periodically; in others, pro re nata. The latter seems most accurate and very practicable.